No. 25.

Brief of Kirlin for Appellees.

Filed Jan. 26, 1897.

SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1896

No. 175

THE JOHN G. STEVENS, her Engines, &c., EDWARD H LOUD et al., Owners of THE C. R. FLINT
Intervenors and Appellants

against

FREDERICK H. GLADWISH and others
Libelants and Appellees

On Certificate from the United States Circuit Court of Appeals for the Second Circuit

# BRIEF FOR THE APPELLEES

J. PARKER KIRLIN
*Of Counsel*

# SUPREME COURT OF THE UNITED STATES.

**October Term, 1896. No. 175.**

The "JOHN G. STEVENS," her engines, &c., Edward H. Loud and others, owners of the "C. R. FLINT,"
Intervenors and Appellants,

vs.

FREDERICK H. GLADWISH and others,
Libelants and Appellees.

BRIEF FOR APPELLEES.

The cause comes before this Court on a certificate from the Circuit Court of Appeals, for the Second Circuit.

*Certificate.*

A decree adjudging that the libelants and appellees, Gladwish *et al.*, recover against the said steamtug *John G. Stevens* the amount reported due to them by the Commissioner, with interest and costs, amounting in all to two hundred and eighteen dollars and seven cents ($218.07), and further adjudging that the lien of the appellees is a superior lien and entitled to priority over the lien of the appellants, Edward H. Loud *et al.*, and that the balance of the proceeds of the sale of said steamtug be paid out of the registry to said appellees, having

been made in the District Court of the United States for the Eastern District of New York, and an appeal having been taken therefrom to this Court by the above named Edward H. Loud *et al.*, and the cause having come for on final hearing, a certain question of law arose, concerning which this Court desires the instruction of the Supreme Court of the United States for its proper decision. The facts out of which the questions arose are as follows:

1. That the home port of the tug is New York.

2. That between December 7, 1885, and March 9, 1886, Gladwish, Moquin & Company furnished coal to the tug in her home port, and filed notices of lien therefor under the laws of the State of New York, Chap. 482 of Laws of 1862, thereby creating statutory liens on her.

3. That on March 8, 1886, the tug *J. G. Stevens* was employed in the port of New York to tow the schooner *C. R. Flint* through the waters of said port, and while towing negligently allowed the *Flint* to collide with the bark *Doris Eckhoff* in tow of the tug *R. S. Carter*.

4. On March 16, 1896, Loud *et al.*, owners of the *Flint*, libelled the *Stevens* and the *Carter* in admiralty, in the District Court of the United States for the Eastern District of New York, for the collision damage.

5. On March 16, 1896, Gladwish, *et al.*, libelled the *Stevens* in the same Court, to enforce their supply lien under the State law.

6. The Loud libel resulted in a decree condemning both tugs for damages exceeding $15,000

7. The Gladwish libel resulted in a decree condemning the *Stevens* for the coal supplied and costs, in all $218.07.

8. The District Court awarded priority to the supply lien, which exhausts the fund resulting from the sale of the *Stevens*, leaving the Loud decree unsatisfied.

Upon these facts this Court desires instruction upon the question of law for the proper decision of said cause, namely:

*Is the lien for the damages occasioned by negligent towage which arose on March 8, 1886, to be preferred to the previous State lien for supplies, the libel for supplies being filed last?*

## Statement.

The appellants, owners of the schooner *Flint*, engaged the tug *Stevens* to tow her. The tug negligently ran the schooner into another vessel, and the appellants have procured a judgment for the damages for $15,606.15. To enable the tug to enter upon this towage service and other towage services, the respondents supplied the tug with necessary coal, for which the respondents obtained judgment *in rem* against the tug, amounting to $218.07. The State statute gives a lien for this and other similar contract liens, which it declares shall be "superior to all other liens, except seamen's wages," *i. e.*, superior to mere damage claims. This preference, with slight exceptions, is in accord with the general maritime law.

The appellants contend that the English-American law as to the rank of contract liens is opposite to the rank given by general maritime law and by the State statute; and that liens *ex delicto*, among which this tow's lien, as a *quasi tort*, may be classed, *override all contract liens*. We maintain the contrary.

### *The Question Certified.*

The question propounded is essentially the broad question above stated; for it is conceded that a lien for negligent damage to a *tow* in executing a contract of towage, is of the same rank as a lien for *damage to cargo* on board the offending ship (Mr. Justice BRADLEY, in the *Alabama and Gamecock*, 92 U. S., 697; Mr. Justice CLIFFORD, in *Sturges* vs. *Boyer*, 24 How., 122; Mr. Justice MATTHEWS in the *J. P. Donaldson*, 21 Fed., 680; the *Columbia*, 44 U. S. App., 326). And it is also now settled that a statutory lien for supplies has the same status as a maritime lien (The *J. E. Rumbell*, 148 U. S., 1).

The question is, therefore, practically, this:

DOES THE LIEN FOR CARGO-DAMAGE OVERRIDE THE LIEN FOR WAGES AND NECESSARY SUPPLIES ON THE SAME SHIP?

We say, "wages *and* supplies," (1) because the recent American cases embrace both; (2) because the arguments for the priority of the damage claim apply, for the most part, to both alike, and (3) because the English cases, from which the mistaken inferences have been drawn, and which have been the *chief source* of error, were all *wages cases*; so that if the appellant's contention fails as against wages, it must fail as against supplies.

Upon the question certified the decisions in the lower courts are conflicting, with the preponderance of authority holding that the lien for supplies outranks that for damage arising from negligent towage. The *Samuel J. Christian*, 16 Fed. Rep., 797; The *Young America*, 30 Fed. Rep., 789; The *J. G. Stevens*, 58 Fed. Rep., 792; and an intimation by Mr. Justice BLATCHFORD in his decision in The *R. S. Carter*, 40 Fed. Rep., 331.

The opposed cases are The *M. Vandercook*, 24 Fed. Rep., 472; The *Daisy Day*, 40 Fed. Rep., 538.

It has also been held by Judge CHOATE, in The *Orient*, 10 Benedict, 620; by Judge BENEDICT, in The *Samuel J. Christian*, 16 Fed. Rep., 797, and by Judge SEVERENS, in The *Daisy Day*, 40 Fed. Rep., 538, that the lien for wages should be preferred to a claim of damage from negligent towage.

Upon the cognate question of the rank of the lien for pure tort and liens *ex contractu* it has been held by Judge BROWN, in the Southern District of New York, that the contract lien for supplies should be preferred (The *Amos D. Carver*, 35 Fed. Rep., 665);

The contrary decisions are those of Mr. Justice BLATCHFORD, in The *R. S. Carter*, 40 Fed. Rep., 331, that the collision claim arising from pure tort should be preferred to the lien for supplies; those of The *F. H. Stanwood* (Court of Appeals, 7th Circuit), 49 Fed. Rep., 577, of Judge NIXON, in the *Maria and Elizabeth*, 12 Fed. Rep., 627, and of Judge SWAN,

in The *Nettie Woodward*, 50 Fed., 224, holding that the damage lien has priority over seamen's wages.

In this brief the following contentions will be maintained:

(1) That the case of *Norwich* vs. *Wright* (13 Wall., 104), contains no adjudication as to the comparative rank of a supply or wages claim, and a damage claim. It merely adjudged that the *two classes of damage claims* then before the Court, viz., one a *quasi tort*, for the negligence of the steamer in carrying her own cargo and, the other, a claim in *pure tort*, for sinking the schooner *Van Vliet* and her cargo, were on an equality. Both claims were *ex delicto*. This Court is not in the least committed to the errors of Maclachlan in the passage which was quoted from him for the use of that part of the passage only which was correct.

(2) That the precise case here presented has not been decided in England. It could not arise there, for the English law gives *no lien* for ordinary supplies, and *no lien* for *cargo* damaged on the offending ship; and in towage contracts the tow is regarded as *principal*. This whole case is outside the pale of the English law.

(3) That by the universal maritime law, contract liens are preferred to liens *ex delicto*. The *Consulado* establishes no certain preference, except that in favor of seamen, which outranked all other claims. This alone destroys the appellants' whole theory. Beyond that the law of liens was not then matured. The inferior rank of damage claims was, however, fully established prior to the French ordinance of 1681, which at once became the accepted law of all Europe, and is the parent of all subsequent continental codes. Nowhere has that order of rank since been disturbed.

(4) That contract liens are preferred, because based upon the *necessities* of the ship, and upon the *credit given* to the ship; this preference is also required by humanity and public policy, which demand that the comparatively small claims of seamen, workmen and materialmen should be preferred to the larger and non-beneficial claims of ship and cargo in general commercial dealings, which are *otherwise secured by insurance*. The former *need protection*, and rightly rely upon it; the latter do not.

(5) That the long standing maritime law of the commercial world is a part of the law of this country; and upon all unsettled points it is an authoritative standard and guide in purely maritime questions like the present, except where that law is discordant with our time and its needs. The subject of maritime liens was adopted into our law from continental and not from English sources; the restrictions of the English law did not apply to the colonies; reference should therefore be made to the general usage and practice of maritime nations in fixing their rank.

(6) The rank accorded to the different maritime liens in this country, has, in the main, followed the universal maritime law as embodied in the French Marine Ordinance of 1681.

(7) The confusion in the American cases is of recent growth. It has arisen from the false generalizations and statements of some recent English text writers, saying that "liens *ex delicto* are superior to liens for wages, supplies, &c." No such adjudication is found in the English law. These false generalizations are based upon a few misapprehended decisions of Dr. Lushington in connection with the *Limited Liability* Act, and *marshaling securities*, in respect to *foreign vessels*, in which cases Dr. Lushington remitted the seamen to their *personal remedy* against the foreign owner, as against the

English creditor, who had no such remedy; this was done *without reference* to the *normal rank* of the wages lien, and presupposed its normal superiority. The wages of seamen have always enjoyed a paramount lien both in English and American maritime law.

The arguments in favor of a reversal of the marine rule contain nothing new; they were unanimously overruled ages ago.

(8) That the present case presents the question of the *normal rank* of the two liens, unembarrassed by any special circumstances connected with the limitation of liability, or the marshaling of different securities held by the opposing lienors. Both creditors here have precisely the same remedies.

(9) The contention that the whole ship, including seamen's and materialmen's interest as lienors, is devoted to the payment of damage liens, is simply begging the question. From the dawn of the maritime law this has been otherwise; as is shown by the fact that the *seamen's* lien has always been preferred to damage claims.

(10) The fact that the ship is the *instrument* of the damage is not the reason nor the basis of the damage lien. This theory breaks down at the first test, viz., where the damage is done by the *towed* ship, but through the tug's fault, and in which case the ship that inflicted the damage is not liable; the ship's liability is not determined by a *figure of speech*, but by the rule of principal and agent.

(11) That the policy and the maxims of the maritime law, preferring the minor claims of seamen and claims for necessary supplies, as against the broader damage claims of the owners of ship and cargo, are substantially re-enacted in numerous State statutes, including that of New York; and while these statutes do not of themselves bind the maritime courts, they

do declare, in the most authoritative form, the adaptedness of the maritime law, as above expressed, to the needs of our time and people, and call upon the Court not to forsake, but to enforce, the true marine law.

(12) The practical results of reversing the established order of privileges would be unfavorable to commerce.

## POINTS.

### I.

**The relative rank of the damage lien, as compared with the liens for wages and supplies, was not adjudged in *Norwich* v. *Wright*.**

(1.) The confusion in some of the cases in the lower courts has largely resulted from the *dictum* of Mr. Justice BRADLEY in the case of *Norwich* v. *Wright*, 13 Wall., 104, 122. The appellants' argument proceeds largely upon the theory that the question certified has in effect been adjudged by that case. In their brief (p. 15) it is said:

"This Court, in the *City of Norwich*, has expressly *decided* that the lien of cargo on the delinquent carrying steamer was entitled to equal rank with the lien of cargo on the libeling schooner, and in doing so expressly *held that contract liens were postponed*. Instead, therefore, of this ruling of Mr. Justice BRADLEY being a dictum, as is sometimes urged, it was *essential to the decision*, and is decisive against any such postponement of *quasi* torts."

This is a clear error, as will readily be perceived by an examination of the case.

The points before the Court are stated in Mr. Justice BRADLEY'S own words as follows:

"About half-past three o'clock in the morning of the 18th of April, 1866, a collision occurred between

the schooner *General Van Vliet* and the steamer *City of Norwich*, on Long Island Sound, off Stamford, Connecticut. Both vessels were seriously injured and sunk. * * * The *libel* in the case was filed *by the owners of the schooner and her cargo* against the owners of the steamer *in personam*. The District Court made a *decree in favor of the libelants* for $19,975 *for the schooner*, and $1,921.63 for *her cargo*, with interest from the date of the collision. The Circuit Court affirmed this decree. The *respondents, by way of defense* not only denied that the steamer was in fault, but claimed the benifit of the Act of Congress, passed March 3, 1851, limiting the liability of shipowners to the amount or value of their interest in the ship (*City of Norwich*) and her freight, *They alleged in their answer that the steamer at the time of the collision had on board a large and valuable cargo belonging to various parties*—much larger in value than the whole amount of the interest of the defendants in said steamer and the freight then pending, *and that the whole was lost.* And before the decree was passed, the *respondents filed a petition wherein they alleged that proceedings in rem had been commenced* in behalf of said parties against the steamer, in the District Court of the United States for the Eastern District of New York, *for the recovery of damages for the loss of said cargo.* They, therefore, prayed that they might be permitted to show, by proper evidence, the whole amount of *damages sustained by all of said parties, including the present libelants*, and the value of said steamer and her freight then pending, and that the decree of the Court might be so framed as to give the libelants such part or proportion of the amount of the damages sustained by them, as the value of steamer and freight bore to the whole amount of *damages* sustained by all parties to the collision."

There is no intimation in the pleadings in the case prosecuted *in personam*, nor in the allegations of the answer thereto, nor in the petition for a limitation of liability, of any outstanding liens for either wages or supplies; and Mr. Justice BRADLEY did not state any such question for decision.

The Court then proceeded to consider the merits. On that branch of the case the decree of the Circuit

Court was affirmed. Next it considered whether the petitioners were entitled to the benefits of the limitation of liability Act of 1851; it found that the libelants were entitled to such limitation, and on that branch of the case reversed the decree below.

The further question then arose whether a case for the application of the statute was presented by reason of the total claims being in excess of the value of the *City of Norwich*, after the collision, and her freight for the voyage.

Upon this branch of the case, the opinion of Mr. Justice BRADLEY (p. 122), proceeds:

"But the claim of the libelants alone is not alleged to be greater than the value of the steamer and her freight. The libelants, therefore, would be entitled to receive the whole amount of this damage if they were the only persons *who sustained damage*, or if, by reason of the nature of their claim, their lien was *superior to that of the owners of the cargo lost on the steamer*. Liens for reparation for wrong done are superior to any prior liens for money borrowed, wages, pilotage, etc. But they stand on an equality with regard to each other if they arise from the same cause (Macl. Ship., 598). We think, *therefore*, that *the lien of the libelants for the loss of the schooner and her cargo, arising from the collision, is on an equality with the lien for the loss of the cargo of the steamer from the same cause*. This being so, the case for the application of the statute arises; for it is alleged by the libelants that *the damage to the schooner and her cargo, together with the damage arising from the loss of the steamer's cargo*, greatly exceeds the value of the steamer and her freight for the voyage."

(2.) This analysis of the case shows that the only liens whose rank was involved in the decision were (*a*) the lien of the libelants, owners of the schooner *Van Vliet;* (*b*) the lien of the owners of cargo on board the schooner; (*c*) the lien of the owners of cargo on board the *City of Norwich*. The two first liens were for *pure torts;* the last, for *a quasi tort*. The adjudication was, that these two classes of liens

were of equal rank. Nothing more was decided. The question in the present case was ~~untried~~ untouched

(3.) The point as to wages and supplies could not well have been before the Court, because, under the Act of 1851, limitation of liability could only be obtained by a surrender of the offending *res* or her value free of prior contract encumbrances. That Act only gave the right of limitation of liabilities arising from torts or accidents, without the design, neglect, privity, or knowledge of the owner. It did not release him from liabilities *ex contractu*. Exemption from contract liabilities came only with the Act of 1884.

(4.) Although the *decision* of the Court does not aid the appellants, they, nevertheless, rely upon the extra-judicial remark of Mr. Justice BRADLEY that:

"Liens for reparation for wrong done are superior to any prior liens for money borrowed, wages, pilotage, &c. But they stand on an equality with regard to each other if they arise from the same cause (Macl. Ship., 598)."

These sentences, as the reference shows, were quoted and condensed from the first edition of Maclachlan on Shipping, page 598. It is evident that the two were taken for the use of the second, which states that "they [liens for reparation of wrong done] stand on an equality with regard to each other, if they arise from the same cause"; for this was the only point before the Court. The first sentence was of itself unimportant, and was evidently inserted as merely introductory to the second, without any critical consideration. The passage referred to by Mr. Justice BRADLEY, from the first edition of Maclachlan, page 598, is as follows:

"Liens in the nature of reparation for wrong done, usually arise out of collision, and form the subject of proceedings in damage causes. They have their origin in positive law, and in the policy of quieting strife by distributing compensation for injuries done at the expense of the wrongdoer. They

are severally co-extensive in point of right, with the value of the ship and the gross amount of the freight being earned; they furnish, therefore, to sundry sufferers by the same collision, the claim to rank equally and share *pro rata* in the common fund (17 & 18 Vict., C. 104, Sec. 514; 23 & 24 Vict., C. 126, Sec. 35; *Dobree* v. *Schroder*, 2 My. & Cr., 489; *Hill* v. *Audus*, 24 L. J. (Ch.), 229; *Leycester* v. *Logan*, 26 L. J. (Ch.), 306). * * *

"Such liens in virtue of positive law rank against ship and freight in derogation of any rights of ownership, or rights by mortgage or beneficial lien existing at the time of the collision. They acquire thereby *priority* over mortgages, prior bottomry, wages, pilotage, towage and salvage, and subsist adversely to proprietary interests and claims (see 17 & 18 Vict., C. 104, Secs. 504, 505; The *Benares*, 7 Notes of Cases Supp., 50, 54)."

Transposing the order of Maclachlan's sentences, and setting the parts used opposite the paraphase of them, it will be seen that the passage in the opinion of the Court is a substantial quotation and condensation of Maclachlan's words, and need not, therefore, be necessarily taken as Mr. Justice BRADLEY'S individual judgment in regard to the rank of classes of liens not then before the Court.

| OPINION. | MACLACHLIN. |
|---|---|
| Liens for reparation for wrong done are superior to any prior lien for money borrowed, wages, pilotage, &c. But they stand on an equality with regard to each other, if they arise from the same cause. | Liens in the nature of reparation for wrong done * * * acquire * * * priority over mortgages, prior bottomry, wages, pilotage, towage and salvage. * * * They are severally co-extensive in point of right * * * They furnish, therefore, to sundry sufferers by the same collision the claim to rank equally and share *pro rata* in the common fund. |

That this passage, in Maclachlan, so far as it relates to the priority of damage claims over the other liens mentioned, is not only incorrect, but is not supported by the English cases, is shown under Point II.

## II.

**The precise case here presented has not been decided in England.**

(1.) It could not arise there for the English law gives no lien for ordinary supplies (The *Heinrich Bjorn*, 11 App. Cas., 270); no lien for cargo damaged on the offending ship (The *Victoria*, 12 P. D., 105), and in towage contracts, the tow is regarded as principal (The *Ticonderoga*, Swab., 215; The *Sinquasi*, 5 P. D., 241; The *America*, L. R., 6 P. C., 127; The *Niobe* [1891], A. C., 401).

(2.) The misapprehension of the English rule as to the rank of damage claims and liens for wages is chiefly due to incorrect statements of the decisions in the later editions of *Abbott* and *Maclachlan*.

The rule as stated in *Abbott on Shipping*, 11th Ed., p. 621 (quoted by Mr. Justice BLATCHFORD, in the *John G. Stevens*, 40 Fed. Rep., 331, 335), is as follows:

"The maritime lien of damage, originating in the wrong of the master and crew of the vessel in fault, and founded on considerations of public policy for the prevention of careless navigation, takes precedence within the limits which the law assigns to the indemnification of the injured party, even though anterior in date, of liens *ex contractu*. It absorbs, in the event of the *res* proving insufficient to meet all demands, the liens of wages, towage, pilotage and bottomry, leaving them to be enforced by proceedings against the persons of the owners. Were it otherwise, the owners to whom the damage is imputed would be indemnified at the expense of the injured party; the wrongdoer at the cost of him to whom the wrong has been done."

The cases upon the authority of which the law is thus stated, are The *Benares*, 7 Notes of Cas. Supp.; 50, 54; The *Linda Flor*, Swab., 309; The *Elin*, 8 P. D., 39; The *Chimera*, Ship. & Merc. Gaz., Nov. 27,

1852; The *Duna*, 5 Law Times Rep., N. S., 217; 1 Mar. Law. Cas., O. S., 159; The *Elin* (on appeal), L. R., 8 P. D., 129. The appellants also refer to the *Aline*, 1 W. Rob., 111, 118, as authority to the same effect.

The only point actually involved in the *Aline* (*supra*) related to the rank of claims for collision damage and *subsequent* bottomry (*Abb. Ship.*, 13th Ed., 874). The remarks in Dr. LUSHINGTON'S opinion, relative to prior bottomry are *dicta* only; and no subsequent case has arisen in England in which the priority, as between collision damage and prior bottomry, has been decided.

All of the other cases relate to damage claims and wages.

The leading case is The *Benares*, 5 Notes of Cas. Supp., 50. The owners sought to limit their liability under the statute of 53 & 54 Vic. III., which required surrender of the "value of the ship *and freight*." The question was really nothing more than the construction of the word "freight" and the intent of the statute. The inquiry was whether the bail should bring into court the "gross amounts of freight on the homeward voyage at £2,538 12s.9d., or whether the owners could discharge themselves by bringing in the net freight after making the following deductions for disbursements which they had paid, namely: commissions, £25 7s. 6d.; wages, £554 10s.; dockage, pilotage, towage and other similar charges, £85 14s. 6d. This would have left a net freight of £1,883 0s. 8d. The point came before the Court on a motion to decree a monition against the bail to bring in the gross freight.

Dr. LUSHINGTON, in the course of his judgment (at p. 53), said:

"In all the cases cited one must bear in mind whether or not the owners of the ship which had done the damage were or were not *solvent* persons; because questions of exceedingly great difficulty might arise, which I do not mean to anticipate, except by

saying that, as questions of towage, wages and salvage may all be mixed up in bankruptcy cases, *I do not mean to bind myself by any observations I am going to make on any of these complicated questions.*"

Continuing (at p. 54) he said:

"In this court it has always been held that the mariner has a lien on the freight. This being so, let us consider what the words of the statute are: 'The value of his or their ship or vessel and the freight due or to grow due for and during the voyage.' There is nothing said as to how we are to ascertain the value of the ship or the amount of the freight or whether any deductions shall take place or not. I apprehend it is quite clear that no deductions can be made on account of the ship, for bottomry, mortgage, pilotage or towage or any other demands. Then why should such deduction take place on account of freight? Why should it be said that the one is the gross freight and the other is the net? Why the wages of the crew, anchorage, boat hire, pilotage and towage should be more chargeable against the freight than against the ship I confess I am at a loss to understand."

Bearing in mind the question which was before the Court, it is obvious that Dr. LUSHINGTON did not mean to deal with the priorities, in a case of *competing liens* put forward by those who had earned wages, pilotage, towage, &c.; but decided only that an owner having paid and extinguished the liens could not deduct the amount of them from the freight, but must bring the gross freight into the limitation proceeding. The same practice in effect has existed in the Second Circuit under our Act of 1851 (Rev. St., § 4284) requiring *superior liens* to be paid off before surrender. (The Ada, 300 Fed. 499)

Under a statute providing for a release of the owner from personal responsibility upon certain *prescribed terms*, those terms must be complied with; they do not affect the *rank* of privileged claims.

(3) The superior claims of seamen and the explanation of the English cases was so clearly and so justly set

forth by CHOATE, *J.*, in 1879, in the case of The *Orient*, 10 Ben., 620, that we quote from his opinion *in extenso*. In that case the petitioners having a claim in tort for damage to another vessel, contended that their claim was superior to that of the seamen of the vessel in fault, citing the English text books and decisions of Dr. LUSHINGTON. Upon this point, Judge CHOATE observed as follows:

"Several foreign decisions are cited to sustain this claim. The first is the case of The *Benares*, 7 Notes of Cases Suppl., 50. * * * There was no claim of seamen here competing with the claim of the party injured by the collision, but simply a claim of the owners who had paid wages to deduct them from the freight which had been attached. The question which would be the superior lien did not arise in the case and the opinion of Dr. LUSHINGTON seems not to touch that question. There is not even a dictum in the case adverse to the seamen's lien for wages in such a case, as I understand the decision.

"The case of The *Linda Flor*, Swabey, 309, is the only other reported English case cited. It was a suit for mariner's wages against a Portuguese ship, and the claim was opposed by a party who had obtained a decree against the vessel in a cause of damage, the proceeds being insufficient to meet all the claims. Dr. LUSHINGTON held that in such a case, there being no evidence that the foreign owners were insolvent, the injured party who had obtained a decree should be paid out of the fund in preference to the seaman. He applied to the case the equitable doctrine which governs cases of marshaling assets between competing claimants, that a party who has two funds to resort to shall, as against a party having only one of those funds to resort to, be remitted to the fund to which the other party cannot resort. And as the seamen could resort to the personal liability of the owners in their own country, which was assumed by the Court to afford no practical remedy of any actual value to the other claimant, they should be compelled to do so; that in such a case to permit the seamen to reduce the only fund to which the injured party could resort would be merely to benefit the owners and relieve them from a part of the liability which the law imposed on them for the injury inflicted by them. I think this is the point of the decision. The learned Judge

indeed adds that 'it is not to be forgotten that in all these cases of damage, or nearly all, the cause of the damage is the misconduct of some of the persons composing the crew.' I do not understand the decision to rest in any considerable degree on this last suggestion. On the contrary, this seems to be thrown in merely as a suggestion, showing that in many cases no real injustice will probably be done by the application to a case like that before the court of the equitable doctrine of marshaling assets. The case is by no means an authority that, upon the sole ground of punishment for misconduct or retaliation, the seamen of the offending ship forfeit any of the rights which the maritime law gives them against their own vessel for their wages. Nor is this case an authority for the position that English seamen would, as against English parties suing in an English court for damage by collision, be remitted to their personal remedy against their English owners. The principle of marshaling assets would seem not to go so far. The important fact assumed by the Court as existing, that the party injured would stand no chance of obtaining redress in a foreign court for any balance due to him of the owner's liability, would not exist in such a case. It could not be assumed that in an English court the party injured would not receive full justice against the owners equally with the seamen, and in such a case that would not be subjected to the expense, delay and uncertainty of a resort to a foreign tribunal, perhaps in a half-civilized country, whose law might be wholly inadequate for their relief. Dr. LUSHINGTON says, in that case, 'in case of a foreign ship doing damage and proceeded against in a foreign country, the injured party has no means of redress save by proceeding against the ship herself, which I apprehend is one of the most cogent reasons for all our proceedings *in rem*.'

"The only other English case cited is The *Chimaera*, unreported, but stated in The *Linda Flor* to be precisely like that case. It must be assumed, therefore, that it was the case of foreign seamen competing with English parties who had a claim for damages by collision.

"The case of The *Duna*, 13 Ir. Jurist., was the case of a Russian ship proceeded against in the Irish Admiralty Court. It was like the case of The *Linda Flor* and is decided on the authority of that case. In the case of The *Enterprise*, 1 Lowell, 455, the same

rule was applied as against British seamen, on the ground that the law of Great Britain controlled the case. And Judge LOWELL there says: 'I believe no admiralty court of the United States has decided the general question of the order of priority of these liens.'

"The equitable doctrine of marshaling assets undoubtedly prevails in admiralty courts and will be applied where its application will do no injustice. Thus even in a case of seamen's wages where there are two funds to which they can resort, as the ship and the freight, each equally available and equally certain, they may for the benefit of other parties having only a claim on the ship, be decreed to be paid out of the freight' (The *Sailor Prince*, 1 Ben., 466). Perhaps the application of this doctrine as made in the cases of The *Linda Flor* and The *Dona* would, as against foreign seamen, be held in this country a reasonable application of that doctrine, although it remits the seamen to a remedy far less certain and expeditious than their remedy against the ship.

"But whether the same rule would obtain here it is unnecessary to inquire, because, as it seems to me, the principle of those cases, so far as it is a principle of the marshaling of assets, does not apply to the present case. This steam-tug was registered in New Jersey. Her owner lives in the District of New Jersey. It cannot be said that the injured party will be practically without redress there. Throughout the United States the courts are open to him as freely and with equal chance of justice as to the seamen. New York and New Jersey do not stand in this respect in relation to each other as did England and Portugal, or Ireland and Russia. In the case of foreign seamen the question how far a court of admiralty shall take jurisdiction of their suit for wages, is a matter of discretion, and this being so the Court is bound to look in the exercise of that discretion to the rights and interests of all other parties; and this might justify these English decisions as the rule to be applied here in the case of a foreign ship presenting the like equitable considerations for remitting the seamen to their home tribunals.

"The later editions of *Abbott on Shipping* give some countenance to the idea that these English cases have established the rule independently of the nationality of the ship, that a lien for damage by

collision takes precedence of the lien for wages, on 'considerations of public policy to prevent careless navigation' (*Abbott on Shipping*, 11th Ed., p. 621). As no other authority is cited for this proposition than the cases above referred to, I think the point cannot be deemed established by authority. Indeed, in the same work (p. 633), it is admitted that 'the priority of the lien for damage over liens *ex contractu* is not expressly declared in any of the foreign maritime codes, or discussed by the commentators upon them.' The learned author then adds, 'but it seems to result from the unqualified terms in which the liability of the owner of the wrong-doing vessel to the extent of the value of it, is everywhere laid down.' With deference to the great authority of Lord TENTERDEN on a question of this character, I think it must be said that these *dicta* go far beyond any decided case.

"*And I fail to see how the rule of the maritime law, limiting the liability of shipowners* and especially how the statutory limitation of that liability in England and the United States, *affects the question.* The primary and apparently the only purpose of these statutes was to limit the liability of owners and *not to impair the rights of any other party;* and if, in consequence of other claims against the ship or freight, the injured party cannot get satisfaction out of the primary fund, that is, the ship and freight, to the extent of the statutory limit, or the owner cannot, by reason of such other claim and incumbrance thereon, surrender the thing against which the injured party has a remedy *in rem* in such condition as to satisfy that limited liability, I see no reason why, in cases of domestic ships, at least, the injured party should not, for the unsatisfied balance, be remitted to his personal remedy against the owner. Against this *dictum* I set the authority of the same author in the earlier editions of his work on shipping (4th Amer. fr. 5th Lond. Ed., p. 484): 'In proceeding against the ship in specie, if the value thereof be insufficient to discharge all the claims upon it, the seaman's claim for his wages is preferred before all other charges, for the same reason that the last bottomry bond is preferred to those of an earlier date. The labor of the seamen, having brought the ship to the destined port, has furnished to all other persons the means of asserting their claims upon it, which other-

wise they could not have had.' This doctrine seems to be well supported by authority and to be applicable as well to claims for collision as to other claims, unless this policy of retaliation or retribution for the wrong done by the ship is also a rule of the maritime law.

"That doctrine seems to me inconsistent with the uniform policy declared by courts of admiralty in respect to seamen's wages, and to have no foundation. It is true that for misconduct towards their own ship seamen are punished by the forfeiture or diminution of wages in some cases, but both in England and the United States this species of punishment is carefully regulated by statute and strictly guarded against abuse, and these regulations have never extended to any case of misconduct except towards the seamen's own ship and her officers. To hold all the seamen of the offending ship liable to punishment by a partial or entire forfeiture of their rights would be a wholesale condemnation of innocent and guilty alike, and not in accordance with the probable facts of the case or with natural justice; and I see no such equity of the injured party and no such controlling policy to prevent careless navigation as to require this. Depriving seamen of their lien and remitting them to their personal action is a partial deprivation of their rights. It is in the nature of a forfeiture or punishment. The remedy to which they would be remitted is neither so certain nor so expeditious, and the rule contended for, if applied, does seriously impair the rights of seamen not shown to be personally guilty of any wrong."

(4.) The foregoing explanation by Judge CHOATE that Dr. LUSHINGTON's decisions were not based upon the relative rank of the liens in question, and was no adjudication as regards their rank, was fully sustained four years afterwards (in 1883) by the English Court of Appeals in the case of The *Elin*, 8 Prob. Div., 39, 129, wherein foreign seamen claimed that their wages should be taken from the proceeds of a foreign ship held for a claim in collision in behalf of English creditors. Referring to Dr. LUSHINGTON'S rule in such cases, BRETT, Master of the Rolls, says:

"It has been argued that these cases have been wrongly decided, because they break through the rule of the admiralty court in regard to priorities of maritime liens. But The *Linda Flor* was *decided on principles quite independent of the rule as to priorities*, which was one well understood by Dr. LUSHINGTON, and which, indeciding the case I have mentioned, *he never intended to break through.* * * * Payment of wages out of the fund was disallowed *independent of any mere question of privilege.*"

In The *Young America*, BROWN, *J.*, after referring to these explanations of the English cases, observes:

"Whether in connection with the law or the statutes that limit the liability of shipowners for the torts of the ship, a court of admiralty should, in the exercise of its equitable powers, remit seamen to their personal remedy against the master and owner, must depend upon the circumstances of each case, and upon quite different principles from those that determine the mere rank of liens. In England the rule has never been applied to her own seamen, nor to her own ships; but only to cases of foreign ships having responsible owners. It can have no application to domestic vessels, in our own forum, where the personal responsibility of the owners is equally available to both classes of lienors, except in the case of bankrupt owners; and in that case there is no superior equity in mere damage liens as such."

(5.) In *Abbott on Shipping* (13th Ed., 876) the author makes this comment:

"Where claims of wages and salvage are mixed up by the bankruptcy or insolvency of the shipowner, by whose vessel damage has been done, it would appear that no certain rule has been adopted for its guidance by the Court of Admiralty * * * (p 873). *There seems, however, to be no decision that such a claim is to be postponed if the seamen, from the bankruptcy of the owner or some similar cause, have no other remedy for the recovery of what is due to them.*"

This in effect surrenders the whole case, since that situation alone presents the true test.

That the lien of seamen for their wages has always in English law been held to be of a sacred and indelible character is shown under Point III.

## III.

**By the universal maritime law, including that of this country and England, contract liens are superior in rank to liens *ex delicto*.**

The contrary doctrine now for the first time urged upon this Court is absolutely without any solid foundation in the maritime law.

1. This is shown beyond the shadow of doubt by the status of *seamen's wages*, which from the very beginning were declared to be preferred to all other claims.

In the *Consulado* mariners are given a privilege over the claim for cargo sold for money to advance the voyage (3 *Black Book Adm.*, 163-164); over the claim for cargo lost (*Ibid.*, p. 85); over the claim for cargo damaged by bad stowage or negligence (*Ibid.*, p. 93), and over the merchant freighter's lien for damage to cargo from towing a derelict (*Ibid.*, p. 464). The claim for the wages extended to the ship (if by trick the freight proved to be insufficient to pay them) even in the hands of purchasers (*Ibid.*, p. 199); and their lien attached to the ship, even when let out for a lump sum (*Ibid.*, p. 261). The claim of seamen for wages on a voyage is preferred to that of builders, outfitters and materialmen in the Amalphitan Table (4 *Black Book Adm.*, 45, 47).

2. In the *Consulado* there is no distinction between privileges, except for seamen's wages, which are always placed first. Beyond that, no preferences are clearly indicated, though the "ship pays the whole."

The passages cited by the appellants conclusively demolish their theory of the superiority of liens *ex delicto;* and as respects claims other than seamen's wages, they are ambiguous at best. The appellants have not called the attention of the Court to any passage relating especially to collision damage. Since the relation of tow to tug is analogous to that of cargo to carrying vessel, they refer to the provisions relating to cargo damage. Chapter 18 (3 *Black Book Adm.*, 82) provides that for such damage arising from negligence the "*managing owner* ought to make compensation for all the loss which the merchants may incur from their goods becoming damp, as far as the means of the managing owner suffice; and *if they do not suffice, the ship ought to be sold* without the part owners or the creditors having any preference, *saving always the mariners, who are not to lose their wages.*" But in Chapter 61 (3 *Black Book Adm.*, p. 163) it is provided that if the ship is in a place where the managing owner has need of ship's apparel or necessaries, the merchant ought to lend it to him, and all the part owners who shall be in the ship and any "earlier lenders" ought to be bound to the said merchants. In Chapter 62 (*Ibid.*) it is provided that if the managing owner of the ship has need of money and cannot find it, and is in a desert place, and if the merchants have no money, they ought to sell some of their goods to refit the vessel, and no preceding lender nor part owner can say or object that the said merchants shall be paid, saving always the wages of the mariners. Chapter 194 (3 *Black Book Adm.*, 387) provides that the lender may cause the ship to be sold, and requires that any surplus remaining from the sale shall be paid over to the other part owners.

No provision is made for a case where the merchant freighters and "lenders" both have claims, and the proceeds of the sale are insufficient to pay both.

In the sloop *Merchant*, Abbott's Adm., 1, 5,

BETTS, *J.*, referring to the provisions of the *Consulado* on this subject, said:

"In the subsequent chapters, in which provision is made for the sale of vessels to satisfy what are now regarded as maritime liens, it is at best equivocal whether the sales were not made by force of executions on judgment or decrees first obtained in personal suits, and not by the direct condemnation of the vessels or merchandise. So Clerke in his admiralty practice does not * * * merely treat first of proceedings *in personam*, but he views the process against vessels and property by warrant of arrest or sequestration as auxiliary only to the suit *in personam* and employed to constrain the appearance of the real party to be charged (tit. 28, *and Oughton's Notes*), and this was clearly so by the civil law. *Wood's Civ. L.*, B. 4, C. 3, Sec. 2."

So far, therefore, as the provisions of the *Consulado* indicate anything, it is merely that the claims, other than wages, stand without preference. The maritime law was still formative and not fully developed on these points.

(3.) During the centuries that succeded and long prior to the *Marine Ordonnance of Louis XIV.*, in 1681, the marine law had become much more matured and definite. This ordonnance embodied the previous maritime law of Europe, and positively defined the following *four classes of privileged claims* to be paid out of the proceeds of the sale of vessels (*Lib.* I., Tit XIV, Sec. 16; 1 *Valin*, p. 42; 1 *Valroger Dr. Mar.*, p. 91).

"Les loyers des matelots employés au dernier voyage seront payés par préférence à tous créanciers; aprés eux, les opposans pour deniers prêtés pour les nécessités du navire pendant le voyage; ensuite, ceux qui auront prêté pour radoub, victuailles et équipment avant le depart; en quatrième lieu, les marchands chargeurs, le tout par concurrence entre les créanciers étant en même degré de privilége. Et quant aux créanciers chirographaires et autres non privi-

légiés, ils seront payés suivant les lois et coutumes des lieux où l'adjudication aura été faite."

This section may be translated as follows:

"(1) The wages of seamen employed on the last voyage shall be paid in preference to all other creditors; (2) after them, those who lent money for the necessities of the ship during the voyage; (3) next, those who have made loans for refitting, provisioning or equipping the ship before her departure; and (4) the merchant freighters; always concurrently among creditors having the same degree of privilege. (5) And as for the specialty creditors and others who are not privileged, they shall be paid according to the laws and customs of the places where the adjudication has been made."

The ordonnance further provides as follows:

"Ship owners shall be responsible for the acts of the master; but they will be discharged therefrom upon abandonment of the ship and freight" (*Lib.* II., Tit. VIII., Art. 2; see 1 *Valroger Dr. M.*, p. 276).

In the language of the *Consulado:* "The ship pays the whole" (The *Rebecca*, 1 Ware, at p. 196).

(4.) The ship on surrender, being thus devoted to the payment of *all liabilities* growing out of the voyage, a *general lien* seems implied for all claims in the fifth class, as against any other debts of the owner (The *Rebecca*, 1 Ware, 198, 199). This included all liabilities in contract or in tort that were not embraced in the preceding four "*privileges.*" They fell under the fifth division, and included damages by collision, which, though a general lien in the above sense, had no *privilege* over other general creditors of the ship. By surrender the owner was exonerated from all liability, except for seamen's wages, and those debts which he had personally incurred or had made his own (see *Oakey* vs. *Fort*, 44 Fed., 364).

The above article of the Ordinance of 1681 made no provision for the payment of judicial expenses, nor for salvage. These have been generally inserted in later codes. The omission, however, never

caused embarrassment; for neither expenses nor salvage were within the scope of that chapter of the Ordinance, which was the distribution of the *proceeds* among *creditors*, on the seizure and sale of the ship. The judicial and other expenses were not *debts*, but the means of converting the ship into money for distribution. *Salvage* is not strictly a *debt*. It cannot be sued for at common law; it is a *reward*, adjudged by the law or by the Court, for the rescue of property abandoned or endangered, and it was in part otherwise provided for by the Ordinance (see 1 *Valroger*, p. 165). Salvors, moreover, being usually in *possession* of the property, were secured by other provisions of the law. The Ordinance was dealing with *non-possessory liens*.

The four main classes of privileges, as laid down as above in the Ordinance of 1681, have never been departed from by any commercial nation. Subsequent codes have enlarged the specific provisions; but not one has ever departed from the *order* of *privileged claims* there laid down. That is the law of the whole commercial world to this hour. Nowhere is any damage lien privileged above wages and supplies.

(5.) The superiority of the Marine Ordonnance of 1681 for its terseness and precision caused it to be speedily accepted throughout Europe as the embodiment and best expression of the pre-existing law. Its authority as a true exposition of the customary maritime law prevailing at that time, is unquestionable.

In *Norwich* v. *Wright*, 13 Wall., 104, 120, Mr. Justice BRADLEY referred to "the *maritime law as codified* in the celebrated Ordonnance de la Marine in 1681"; in the *Scotland*, 105 U. S., 24, 28, he again referred to "the text of the French ordinance, which is *regarded as merely formulating the old customary law*"; and in the *Main*, 152 U. S., 122, 123, Mr. Justice BROWN spoke of "the French ordinance of 1681, which has served as a model for most

of the modern maritime codes." Judge PETERS, in his introduction to a partial translation of the ordinance (2 Peters Adm., Appendix 1), said:

In the case of *Morgan & Price* v. *Insurance Company of North America*, decided by the Supreme Court of this State in January, 1807, Chief Justice TILGHMAN, having referred to one of the articles of these ordinances, thus expressed himself: 'They and the commentaries on them have been received with great respect in the courts both of England and the United States, *not as conveying any authority in themselves, but as evidence of the general marine law*. When they are contradicted by judicial decisions in our own country they are not to be regarded; but on points which have not been decided they are worthy of great consideration.'"

In The *Rebecca*, 1 Ware, 188, 193, WARE, *J.*, referred to the authority of the ordinance, and to the section in which the rank of existing privileges was stated as follows:

"The principle of reciprocal liens, of the cargo on the vessel, and the vessel on the cargo, is established by the *Ordonnance de la Marine*, *L.* 1, *T.* 14, *Art.* 16; *Liv.* 3, *Tit.* 3, *Art.* 24; and is preserved in the *Code de Commerce*, 191, n. 11,307. But this was not the introduction of any new and peculiar principle into the maritime code of France. It was merely sanctioning, by a formal act of legislation, what had existed as customary law from time immemorial, and so it is considered and treated by the commentators on the ordonnance and code (1 *Valin*, 363, 629, 666).

"Emerigon, in commenting on L. 1, *Tit.* 14, Art. 16, *Saisie des raissaux*, which contains an enumeration of certain privileged credits, including the one now under consideration, says that the article (No. 16) *neither creates any new privilege, nor takes away any that existed before*" (*Contracts a la Grosse*, *Ch.* 12, *Sect.* 4).

(6.) Of the criticisms of Emerigon on the rank of these privileges (to which the appellants call attention), that the lien of the merchant freighter should be placed before that of the seamen, who may be

responsible for the damages, and before that of the materialmen, because the shippers were ignorant of the supplies and loans which may have been made in the place of outfit, WARE, *J.* (*ibid*, 193, 194), said:

"Whatever may be thought of Emerigon's criticism of the arrangement of privileges by the ordonnance, there can be no doubt that he considered the lien in question as existing, *independently of it, by the general maritime law*. *Boulay-Paty*, the most approved commentator on the maritime part of the Code de Commerce, in his remarks on this article, says: 'This rule is very ancient in the usages and customs of the sea' (*Cours de Droit Maritime*, *Vol.* 2, 297." (*a*)

(7.) Although additional privileges have been established in most of the continental codes to meet the growing needs of commerce, the privileges mentioned in the Ordonnance of 1681 are retained in all, and their *relative rank* to each other has *never been disturbed*. Translations of a number of these codes are appended to Mr. Ash's brief for the appellees.

In the French Code of 1807, class 1 of the ordinance is ranked sixth; class 2, seventh; class 3, eighth; class 4, eleventh (Mr. Ash's Brief, pp. 47, 48).

In the Italian Code of 1882, class 1 of the ordinance is ranked seventh; classes 2 and 3, ninth; class 4, eleventh (*Ibid*, p. 49).

In the Belgian Code, class 1 of the ordinance is ranked seventh; class 2, eighth; class 3, ninth; class 4, thirteenth (*Ibid*, pp. 50, 51).

In the Code of the Netherlands, class 1 of the ordinance is ranked fifth; class 2, sixth; class 3, seventh and ninth; class 4, tenth (*Ibid*, pp. 52, 53).

In the German Code of Commerce, class 1 of the ordinance is ranked second; classes 2 and 3 (with others), third; class 4, fourth (*Ibid*, p. 54).

In the Maritime Code of Norway, July 20, 1893, class 1 of the ordinance is ranked second; classes 2

(*a*) The criticisms of Emerigon are answered in 1 *Valroger, Dr. Mar.*, pp. 157, 158; 1 *Desjardin, Dr. Com. Mar.*, 290, 291.

and 3 (with others, see also Section 269), third and fourth; class 4, fourth (*Ibid*, pp. 55, 56).

In the Code of Commerce of Spain, class 1 of the ordinance is ranked sixth; class 2, eighth; class 3, ninth; class 4, tenth (*Ibid*, pp. 57, 58).

(8.) In view of the persistency with which the four classes of express privileges mentioned in the ordinance have maintained their relative rank in the law and practice of the maritime countries of Europe for over two centuries, the question in appellants' brief, "But are these codes, enacted since "1808, any authority here?" and the answer it assumes to give appear quite pointless. While doubtless the foreign code ranking of maritime privileges is not to be received as conveying any authority in itself, it is most persuasive as evidence of the general maritime law upon that subject. It also shows that the classification of priorities in the great ordinance has been found adequate and satisfactory to the ever-advancing needs of commerce, from its infancy down to the present time; and as the arguments for ranking the collision claim first are not new, but have always existed, the universal rule of the maritime law which placed it last, affords a most decisive answer to the contention that it should now be placed first.

An express privilege for collision damage is given in comparatively few of the modern codes, but wherever found it is placed last in the whole order of privileges (The *Young America*, 30 Fed. Rep., p. 791).

The right to limit liability by surrendering ship and freight exists throughout the maritime world; and doubtless, when no express privilege is given, the collision creditor in the continental practice is generally paid with other non privileged maritime creditors of the ship out of the surplus, and proceeds, if any, after the payment of the privileged creditors, but before the shipowner's general creditors. This was the case under the ordonnance of 1681.

THE ENGLISH LAW.

(9.) In England, although the precise point here involved has never been decided (see Point II.), the contract lien of the seaman for his wages has been repeatedly held, in the broadest terms, to have a preference over the claims of any other creditor.

In the case of The *Madonna d'Idra* (1811), 1 Dodson, 37, 40, Sir WILLIAM SCOTT, than whom there is no higher English authority in maritime law, referring to seamen's wages, says:

"These are sacred liens, and as long as a plank remains the sailor is entitled, against all other persons, to the proceeds as a security for his wages. This is a principle universally admitted." The same was repeated by him in the case of The *Sidney Cove*, 2 Dodson, 11 (1815).

Lord TENTERDEN, perhaps the next highest English authority, in the last edition of his work that was published during his lifetime, says:

"In proceedings against the ship in specie, if the value thereof be insufficient to discharge all claims upon it, the seaman's claim for his wages is preferred *before all other charges*." *Abb. Ship.*, 5th London Ed., 484.

The contrary statements in later editions are the mistaken additions of later editors.

In The *Neptune*, 1 Hagg. Adm., 227, 239, Lord STOWELL again said:

"Upon all these grounds, on the general practice of maritime states, upon the just policy of the rule, its simplicity and convenience, upon the legal nature and duration of the original contract, upon the understanding of the law, which has generally, though silently, prevailed, I adhere to the spirit, I had nearly said the letter, of what I am reminded of having said in a former case, not exactly upon this question, "that a seaman had a right to cling to the last plank of his ship in satisfaction of his wages or part of them."

In *Brown's Civil and Admiralty Law* (Vol. 2, p. 187) it is said of seamen's wages: "The ship, in fact,

is pledged to them *in preference to any other creditor.*"

In the case of The *Hersey* (1837), 3 Hagg., 404, 407, Sir JOHN NICOLL, referring to bottomry, says:

"The master is not to hypothecate without necessity, for the hypothecation may be unjust, not only as it affects the property of his owners, but by giving a priority of payment to one creditor, and thereby operating to the injury of other creditors, and of mortgagees; for *if the hypothecation be valid*, it has a *preference to all other liens, except seamen's wages.*"

Similar citations might be multiplied almost indefinitely.

AMERICAN LAW.

(10.) The American authorities are to the same effect. In The *Charles Carter* (1808), 4 Cranch, 328, this Court, in reference to a bottomry bond, say:

"There is a strong reason to contend that this claim or privilege shall be *preferred to every other* for the voyage on which the bottomry is founded, *except seamen's wages.*"

In *Sheppard* v. *Taylor*, 5 Peters, 675, Mr. Justice STORY (pp. 710, 711, 712), said:

"This lien is so sacred and indelible, that it has on more than one occasion been expressly said that it adheres to the last plank of the ship (1 Peters Adm. Rep., Note 186, 195; The *Sidney Cove*, 2 Dodson, 11, 13; The *Neptune*, 1 Hagg. Adm., 227, 239). * * * The lien attaches to the thing and to whatever is substituted for it. * * * The owners and the lienholder whose claims have been wrongfully displaced, may follow the proceeds wherever they can distinctly trace them. * * * The lien will follow the ship and its proceeds in whosesoever hands it may come by title or purchase from the owner." (*a*)

(*a*) In the *Ordonnance* it was said that the seaman's lien for his wages adhered to "the last nail" of the ship. (*Translation*, 2 Pet. Adm., App. 32, 35).

In *Brown* vs. *Lull*, 2 Sumn., 443, Mr. Justice STORY says:

"The wages of seamen attach as a lien to the ship and freight * * * as a claim or privilege having a priority to be satisfied *before all other claims*. As it has been sometimes expressively said, they are nailed to the last plank of the ship."

In *Pitman* vs. *Hooper*, 3 Sumn., 50, Mr. Justice STORY again says:

"The seamen's wages generally constitute a lien or claim upon the ship and freight and upon the proceeds thereof, in whatever hands they may be, which must be paid *before any other claims*. It has been significantly said that they are nailed to the last plank of the ship; a figurative expression, which will be found used in one of the earliest maritime codes in modern times (the Consolato del Mare) of which we have any distinct traces (Pard. Collect. des Lois Mar., tom. 2, p. 129; Concol. del Mare, c. 93, 138). And it may be added that they adhere also to the last fragment of the freight."

Mr. Justice LIVINGSTON, in the case of The *Mary*, 1 Paine, 180, uses the same language as that of Sir WILLIAM SCOTT, above quoted, as regards the priority of seamen's wages.

To the same effect is *Foster* vs. *Steamboat Pilot No. 2*, Newb. Rep., 219.

In The *City of Tawas*, 3 Fed., 170, 172, BROWN, *J.*, said:

"That claims for wages should be paid *in preference to all others*, except the costs of sale, of the ship-keeper and of storage and dockage, while the vessel is in the hands of the Marshal, and excepting also subsequent salvage, is well settled in all the districts."

KENT says (Vol. 3, p. *197):

"Their demand for wages takes precedence of bottomry bond, and is preferred to all other demands: * * * their claim is a sacred lien, and as long as a single plank of the ship remains the sailor is entitled as against all other persons to the

proceeds as a security for his wages, for by their labor the common pledge for all the debts is preserved."

In the note, KENT continues as follows:

"The venerable code of the Consolato del Mare, C. 138, expressed itself on this subject with the energy of Lord Stowell, when it declared that mariners must be paid before all mankind, and that if only a single nail of the ship was left, they were entitled to it (Consulat de la Mer, par Boucher, Tome II., 205; see also Cleirac upon the Judgments of Oleron, Art. 8, N. 31, and Boulay Paty, Cours de Droit Com., Tome I., 115). The preference given to seamen for their wages *over all other claims* upon the ship and freight is the universal law of maritime Europe."

Judge CONKLIN, in his work on Admiralty Jurisdiction (Vol. I., p. 112), says:

"Against the ship and freight, and against their proceeds into whosesoever hands they may come, the seaman's claim for wages *has priority over all other claims*. It is a sacred lien, and as long as a plank of the vessel, or a fragment of the freight remains, the mariner is entitled to it in preference to all other persons * * * *even against the title of the Government acquired by forfeiture*." The *St. Jago de Cuba*, 9 Wheat., 609.

Parsons says (1 Ship. & Admly., 160):

"A bottomry bond is preferred *to any other lien whatever*, excepting only the lien of the *seamen* for wages; and the lien of material men for repairs or supplies indispensable to her safety. The reason of this rule is, that a bottomry bond saves the ship; for it is to be presumed that it was made from a strict necessity; and if it had not been made, the other liens on it would have been worthless. The reason of the exception is, that the bottomry bond itself would never have brought the ship within reach of any persons having an interest in or a lien upon her, had she not been navigated home by the seamen."

(11.) From these numerous authorities, beginning with our early reports, it is clear that the general maritime law as respects the *order* of privileges was long ago fully adopted in this country, and that the

recent departure from that order, in a few cases, in favor of damage claims has no other basis than the mistakes noted in the preceding point (p. 13).

It cannot be contended that seamen's wages constitute merely an *exception*, and that damage liens have priority over contract liens, excepting seamen's claims, for two reasons: (1) The only text book authorities cited contain no such exception. They expressly include seamen's wages, with supplies, bottomry, &c. (2) That only adjudications that have given any color to the contention were adjudications concerning seamen's wages and nothing else.

It is therefore plain that the whole contention of the plaintiff must be tested by seamen's wages. If the adjudications in that regard have been misunderstood or misapplied, the whole contention fails.

If we are right in the above positions, further argument is unnecessary, since it is the function of this Court to *declare* the law, not to invent or to reverse it.* It may be useful, however, to examine the subject in its further relations.

*: 21 Wall. p. 577

## IV.

**Contract liens are *preferred privileges* because based upon the *necessities* of the ship and upon the *credit* given to the ship to meet her necessities as an instrument of commerce.**

The argument upon this point starts with the inquiry—

*Why are Liens and Privileges Granted?*

These are of two classes: (1) The *quasi general lien* of non-privileged claims covered by the 5th clause of the ordinance (*ante*, p. 25) upon the owner's *surrender* of the ship in exoneration of his liability; (2.) The particular "*privileges*" or *preferences* established for the distribution of the proceeds of the ship.

(1.) The former is an incident of the *limitation of liability* in favor of shipowners, long a doctrine of marine law. The reason for this limitation of liability was the encouragement of navigation, in order that owners might be willing to invest their property in ships for the promotion of commerce, without subjecting their land fortunes to an indefinite reponsibility for the acts of the master (*Norwich* v. *Wright*, 13 Wall., 116–118). This was merely applying to maritime matters, in a different form, the same right of limitation of responsibility that has been attained in the municipal law by means of *corporations* and *limited partnerships* (*Gokey* v. *Fort*, 44 Fed., 364, 367).

The English Statute (Act of George III.) and the American Statutes (Act of 1851, § 4284, R. S., and Act of 1884, 1 Sup. R. S., p. 443, § 18) have confirmed this limitation of liability and consequent *general lien* in our law.

(2.) The express "*privileges*" of the maritime law are a different thing. *Privileges* are the *preferred claims* among the debts of the ship. It is these express privileges that were referred to in the discussions by Judge BROWN in The *Young America*, 30 Fed., 794, 800; *Amos P. Carver*, 35 do., 667, 669; The *Gratitude*, 42 Fed., 299; The *City of Norwalk*, 55 do., 110–112; and it is only the question of *preferences* among the ship's creditors that is under discussion here. The four express "privileges" or preferred claims of the Ordonnance of 1681 have, as we have shown, been preserved inviolate in every maritime country.

(3.) *Why are these preferences accorded?*

Mr. Justice JOHNSON in The *St. Jago de Cuba*, 9 Wheat., 416, says:

"*The whole object* of giving admiralty process and *priority* of payment to *privileged creditors* is to furnish wings and legs to the forfeited hull to get back for the benefit of all concerned, *i. e.*, to complete her voyage. * * * The vessel must get on. This is the consideration that controls every other;

and not only the vessel, but even the cargo is *sub modo* subjected to this necessity. For these purposes the Law Maritime attaches the power of pledging or subjecting the vessel to material-men, to the office of shipmaster. * * * The *necessities* of *commerce* require that when remote from his owner he should be able to pledge his owner's property to that liability without which it is reasonable to suppose he will not be able to pursue his owner's interests."

The same thing has been reaffirmed in our courts times without number. In no jurisprudence more clearly than in the decisions of this Court does it appear that the basis and the exclusive basis of these privileges are the *necessities* of the ship on the one hand, and the *credit* given to *the ship* on the other (The *Kate*, 164 U. S., 458, and the cases there cited). The promise of the *privilege* to the material-man is his inducement to supply the ship's necessities.

(4.) The established *order* of the four express privileges in the ordinance of 1681 confirms this.

(*a.*) *Seamen's wages* hold the first rank, because they are of the highest necessity and needful *to the last* in completing the voyage; also because the claims are small and the men most dependent and necessitous. A further reason for their preference is that they are forbidden to insure their wages (*Ordonnance*, Bk. III, Tit. VI, Art. 15; 2 *Pet. Adm.*, App. 43; 2 *Parsons Ship. & Adm.*, 67; Lord STOWELL in The *Juliana*, 2 Dods., 509; The *Penelope*, 2 Peters, 276).

(*b.*) *Supplies during* the voyage are next, because they are essential in order to complete it and to save all that precedes.

(*c.*) Supplies for the voyage *before departure* are third, because without them the voyage could not begin, nor cargo be transported.

(*d.*) *Damages* to the cargo are *inferior* to the above, because all the preceding are rendered for the

*benefit* of the *cargo*, as well as of the *ship*, in enabling the transportation to be made, *i. e.*, all are *beneficial* to both cargo and ship, as a joint enterprise. Cargo damages, though not beneficial, are privileged, because the goods were *entrusted to the ship* and upon her *credit;* and the express *credit* of the ship was the reason for this *low* privilege, as against other claims which did *not* arise out of any *credit* of the ship at all, and were of no benefit, while Cargo is beneficial to the Ship in paying freight.

(5.) Damages inflicted on another vessel or her cargo by collision, though a general lien, had no express *privilege;* (*a*) because such a claim does not arise from any *benefit* to the ship (*b*), nor is it based upon any *credit* of the ship; and (*c*) because this claim being ordinarily *secured* by *insurance*, as a sea-peril, there is no *necessity* of commerce, nor any *policy* of the law that calls for any special *privilege* upon such a claim.

At the time of the adoption of the Marine Ordonnance of 1681, marine insurance was universal. The provisions of that ordinance in regard to insurance are very full (2 *Valin*, pp. 205-442). In The *Rebecca*, 1 Ware, 188, 204, WARE, *J.*, pointed out "the elasticity and vigor communicated to maritime adventures by the invention of the contract of insurance." This supplied an *adequate security* as against damages in *pure tort* by collision; and there was no occasion or sound reason for giving *insurers* a special privilege, merely for their indemnification; and most especially so when this would destroy, whenever they came in conflict, the liens of the material men and the seamen, and thereby *pro tanto* defeat the very objects founded in necessity and public policy, for which those privileges were granted.

Considering that all cargoes and ships alike are usually *insured*, the decision in *Norwich* vs. *Wright* in placing the pure tort damage on an equality with the merchant freighter's damage, was no doubt practically just and sound policy, as tending to stop useless litigation between different insurers.

Its effect was only to put both in the fourth rank of the Marine Ordonnance.

(6.) These preferences are also required by humanity and public policy. The reasons that have been assigned for making seamen the wards of the admiralty apply with nearly equal force to the pilot, the keepers and watchman of the ship, the stevedore and the materialman, whose liens are generally trifling in amount as compared with the larger claims of ship and cargo in general commercial dealings.

This fact is well illustrated in the present case. The collision claim amounts to $15,000, while the bill for coal was $125 only, and the decree with costs was $218.07. Moreover, it is notorious that damage claims are, in nine-tenths of the cases before the courts, promoted by underwriters who have for a stated premium expressly assumed the collision risk. It is equally well known that small materialmen in practice do not and cannot conveniently ~~dare~~ are, insure their risks, while seamen ~~were~~ *forbidden* to insure their wages on grounds of public policy (*ante*, p. 36). The practical question in nearly every case like the present is, therefore, whether the Court should sanction the right of an insurer of tort liabilities to absorb, as salvage against his loss, the liens of the small contract creditors, whose liens from time immemorial have been fostered and encouraged by the universal maritime law to satisfy the acknowledged needs of commerce, and cannot be otherwise secured.

(7.) It is said that *insurance* is a wholly independent matter, having nothing to do with the rank of a lien or privilege, as between the original parties, and should not be here considered. This is true when the law is *settled*. But it is quite otherwise, if the law is unsettled, and the question arises: Is there any sufficient reason of private right or public policy, for giving a *new* and *special privilege* to a particular class of claims among the debts of a ship to the injury

of others; and still more, when the question is whether a universally established order of privilege is to be reversed? Then "those who impugn the validity of the rule," in the language of Dr. Lushington (1 Eng. Law & Eq., 668) "are bound to show that the exception taken is one well founded," and that there is some controlling reason of practical necessity or private right which calls for the reversal of the established rule, and for the erection of a new privilege; and this is still more obligatory when its operation would be to extinguish claims hitherto considered the most meritorious. In such a case it is right and obligatory that the whole situation should be broadly regarded, in order to determine what practical justice and public policy and the general needs require.

## V.

**The long-standing maritime law of the commercial world is a part of the law of this country; and upon all unsettled points is an authoritative standard and guide in purely maritime questions like the present, unless it be shown that that law is discordant with our time and its need.**

It has been said in this Court that all the commercial nations, including our own, have adopted the general maritime law as the basis and ground work of their maritime regulations; that the general maritime law, which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to, and that that law was the basis of the system adopted by the Constitution (The *Lottawanna*, 21 Wall., pp. 573, 574, 576).

The extent to which it has been received depends on the maritime usages of this country, as found in commercial practice, in the decisions of the Court, and in such legislation as may have been competent to affect it (*Insurance Co.* vs. *Dunham*, 11 Wall., 1).

In the case of *Butler* vs. *Boston S. S. Co.*, 130 U. S., 527, 556, Mr. Justice BRADLEY, after restating

what had been previously held in several cases, viz.: "That the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country," goes on to say:

"These quotations are believed to express the general, if not unanimous, views of the members of this Court for nearly twenty years past; and they leave us *in no doubt* that, *whilst the general maritime law*, with *slight modifications*, *is accepted as law in this country*, it is subject to such amendments as Congress may see fit to adopt. One of the modifications of the maritime law, as received here, was a rejection of the law has of limited liability. We have rectified that. Congress restored that article to our maritime code."

In the case of The *Harrisburg*, 119 U. S., at p. 213, a right of action for death on the high seas was denied because "the maritime law, as accepted and received by maritime nations generally, leaves the matter untouched," and therefore subject to the municipal law, which gave no such right of action. The clear implication, from the discussion, was that if the maritime law had given any such action, it would have been adopted.

(1.) It is clear that the general subject of liens, and especially the merchant freighter's lien, was adopted by the courts of this country from the general maritime law prevailing on the continent, rather than from English sources.

In The *Phebe*, 1 Ware, 263, 271, WARE, *J.*, said:

"In this country, the lien [merchant freighter's] is not only acknowledged but is enforced by our courts of admiralty, and *having been borrowed from the general maritime law or the customs and usages of the sea, we must look to them*, rather than to our own peculiar maritime jurisprudence *for its true character and the cases to which it applies.*"

See also to the same effect The *Rebecca*, 1 Ware, 188, 193; *Delovio* vs. *Boit*, 2 Gall., 398; *Insurance Co.* vs. *Dunham*, 11 Wall., 36; The *Dolphin*, 1 Flip., 580; *Vandewater* vs. *Mills*, 19 How., 82; The *Virgin*, 8 Peters, 538, 550.

(2.) The legislation of Congress limiting the liability of shipowners adopted that subject from the general maritime law.

(*a.*) This was true of the Act of 1851 (*Norwich* vs. *Wright*, 13 Wall., 104).

(*b.*) The Act of 1884 was apparently based on the continental practice. In *Norwich* vs. *Wright*, 13 Wall., 104, at p. 119, Mr. Justice BRADLEY points out that by the French law of 1841, an exemption was afforded to shipowners from the ship's contract liabilities similar to that later afforded here by the Act of 1884.

(3.) The statutes of various States have adopted from the general maritime law the subject of liens upon domestic vessels, for work, labor and materials (The *Lottawanna*, 21 Wall., 558).

Wherever the maritime law of this country has adopted a complete subject, as that of liens, or of limitation of liability, from the general maritime law, the practice of the Court has uniformly been to refer to that law in the determination of incidental matters arising under it, and to follow the general law in determining such matters, except and unless the provisions regarding the special point as there found, are not adapted to our time or needs.

Having adopted the subject of liens from the general marine law, it is right to refer to that law as evidence of their proper rank. The rank there given the collision lien accords as well with our time and needs, as with the needs of the other maritime nations, in all other time.

## VI.

**The rank accorded to the different maritime liens in this country, in the main follows the universal maritime law, as embodied in the Marine Ordonnance of 1681.**

(1.) *Seamen's wages.* These are usually allowed great priority, for besides the fact that sailors are considered wards of an admiralty court, it is the result of the seaman's labor, which has brought into port, and hence within reach of other lienors, the latter's security, the ship (The *Paragon*, 1 Ware, 326; The *Orient*, 10 Benedict, 620, 626; The *Virgin*, 8 Peters, 538, also cases cited, *ante*, p. 31). Wages have been allowed priority over claims, prior in time, of materialmen and bottomry (The *Virgin*, 8 Peters, 538; The *Superior*, Newb., 176; The *Rodney*, Blatch. & How., 226; The *Aeolian*, 1 Bond, 257; The *Fort Wagne*, *ibid*, 476; The *Melita*, 3 Hughes, 494; The *Virgo*, 46 Fed., 294); over the lien of merchant freighters (The *Paragon*, 1 Ware, 326; The *Leonidas*, Olcott, 12; The *Gratitude*, 42 Fed., 299); *over towage* (The *City of Tawas*, 3 Fed., 179; The *Athenian*, 3 Fed., 248).

(2.) *Supplies and repairs before the voyage begins.* A claim for supplies furnished on a voyage, has priority over a *bottomry* given as security for materials furnished before the beginning of the voyage (The *Boston*, Blatch. & Howland, 309; The *Gratitude*, 42 Fed., 299; The *Samuel Morris*, 63 Fed., 736). This is also implied in the rule that liens lose their priority, if allowed to run into a later voyage; also in the principle that underlies the rule for payment of contract liens of equal rank in the inverse order of creation.

(3.) *Supplies during the voyage.* Those who furnish materials and supplies at a later stage of the voyage have priority over those who furnished them at an earlier stage (The *Omer*, 2 Hughes, 96); over prior bottomry or prior salvage (The *Jerusalem*, 2 Gall., 345; The *Felice B.* 40 Fed., 653; The *Aina*,

40 Fed., 269; The *Olga*, 32 Fed., 329; The *Dora*, 34 Fed., 348; The *E. M. Davidson*, 1 Fed., 259); over a lien for damage to cargo (The *Proceeds of the Gratitude*, 42 Fed., 299). But supplies furnished at the end of the voyage are not prior to wages (The *Virgo*, 46 Fed., 294).

(4.) *The merchant freighters' lien.* This is subordinate to the liens for wages and for supplies (The *Paragon*, 1 Ware, 322, 331; The *Leonidas*, Olcott, 12; The *Young America*, 30 Fed, 789; The *Gratitude*, 42 Fed., 299; The *Samuel J. Christian*, 16 Fed., 796).

## VII.

**The confusion in the American cases regarding the rank of tort or *quasi* tort liens is of recent origin, is based chiefly on the English cases with regard to marshaling of securities, and on the so-called *dictum* in Norwich Co. *v.* Wright. The reasons assigned in the few cases which have preferred the *quasi* tort or tort lien over the liens for wages and supplies do not justify the conclusion reached.**

1. The confusion really began with Judge BENEDICT's decision in The *Pride of the Ocean*, 3 Fed., 162 (1880), where he preferred a claim, arising from collision, over a prior bottomry loan made upon the same voyage, basing his decision chiefly (p. 166) on a *dictum* of Doctor LUSHINGTON in The *Aline*, 1 W. Rob., 118, that the relation of the bottomry lender to the shipowner was voluntary, while that of the damage claimant to the offending ship was involuntary. In The *Pride of the Ocean*, 7 Fed., 247, BENEDICT, *J.*, preferred a collision lien over the claim of a master of a British vessel, claiming wages by virtue of a British statute. The master did not press his claim until after a decree for the collision damages had been entered. The decision was rested partly upon that ground, and upon the further ground that having

been master of the ship, at the time of the collision, he was personally liable for the damage caused by it.

In 1879, Judge CHOATE had decided the case of the Steamboat *Orient*, 10 Ben., 620, holding that the wages of seamen had a priority over a damage claim arising from *quasi* tort (*vid* his opinion, *ante*, p. 16).

The next case was that of The *Maria and Elizabeth* 12 Fed. Rep., 627, decided by Judge NIXON in 1882. It appears from a prior report of this case (7 Fed. Rep., 252) that the question was one as between a claim for pure tort and seamen's wages. It came forward in a limitation of liability proceeding. Judge NIXON's decision was based upon the following considerations: (1) The English cases (which are shown under Point II, to be inapplicable); (2) "The mariners of the wrong-doing ship may be supposed to share in the fault of the vessel"; and (3) the so-called *dictum* in *Norwich Co.* vs. *Wright*.

In 1883, BENEDICT, *J.*, decided The *Samuel J. Christian*, 16 Fed. Rep., 796. The claim there was between (1) a *quasi* tort lien (2) and liens of seamen and (3) liens of material men. The decision was in favor of the seamen and material men, Judge BENEDICT saying (p. 799):

"A different rule applied in the present case would give to MacNab (brig owner), a security for his demand greater than the security for which he entered into his contract. He would be paid out of the proceeds of the tug, *and discharged of the liens of the material men*, whereas, when his contract was made, the tug was subject to those liens."

Judge BENEDICT further said (p. 797):

"I concur in the conclusion arrived at by Judge CHOATE in the case of The *Orient*, and cannot concur with the contrary conclusion arrived at by Judge NIXON in the case of The *Mary and Elizabeth*, 12 Fed., 627. The *dictum* of Mr. Justice BRADLEY in *Norwich Co.* v. *Wright*, 13 Wall, 122 * * * cannot, as it seems to me, be considered to be an adjudication by the Supreme Court of the United States upon the point in controversy. * * * In such a

case I should be sorry indeed to hold that the seamen were to be remitted to an action *in personam* for no other reason than to prevent the owner of the brig from being so remitted. If either is to be turned over to an action *in personam*, in my opinion, it is not the seamen."

In The *M. Vandercook*, 24 Fed., 472, decided by Judge NIXON in 1885, he held that a claim for damages to a vessel and her cargo, caused by the negligence of the tug while towing her, in pursuance of a contract, has priority of payment over liens for repairs and supplies to the offending vessel. The decision was based (1) upon a passage in *Abb. Ship.*, 10th Ed., 533, setting forth a doctrine not justified by the English cases, and (2) upon the words of Mr. Justice BRADLEY in *Norwich* vs. *Wright*.

The next and most thoroughly considered case up to this time was that of The *Young America*, 30 Fed., 789, decided by Judge BROWN in 1887. It was there held, after an exhaustive survey of the law in this country, in England, and upon the Continent, that the lien for supplies outranks that for damage caused by negligent towage.

In The *Amos D. Carver*, 35 Fed., 665, 1888, Judge BROWN held that the lien for necessary repairs and supplies outranks a subsequent lien arising from negligent collision. In this case, the rule previously laid down in the *Young America* (*supra*) as to *quasi* torts was applied and extended to cases of pure tort.

This was followed by The *R. S. Carter*, 38 Fed., 515, decided by BENEDICT, *J.*, in 1889, where he held that a pure tort claim arising from negligent collision has priority over a lien for materials and supplies which attached prior to the collision. The reasons assigned for the decision were (1) the Judge's prior decision in The *Pride of the Ocean*, 3 Fed., 162, where he subordinated a prior bottomry to a subsequent damage claim; (2) Judge NIXON's decision in The *M. Vandercook* (*supra*); (3) one whose claim arises from a voluntary relation to the shipowner should be postponed to

one whose demand arises involuntarily; and (4) one who gives time becomes a party to the employment of the vessel, and has a beneficial interest in that employment.

In The *R. S. Carter*, 40 Fed., 331, decided in 1889, Mr. Justice BLATCHFORD affirmed the decision of Judge BENEDICT (1) upon the authority of the English cases as erroneously stated in *Abb. Ship.*, 11th Edition, 621; and (2) on the remarks of Mr. Justice BRADLEY in *Norwich* v. *Wright*. He adduced no fresh reasons for his decision. He thus sustained the doctrine that a lien for pure tort has precedence over a maritime lien for materials, but was unsuccessful, as we submit, in attempting to distinguish his own decision in The *Frank G. Fowler*, 21 Blatchford, 410, wherein he had held that as between two liens for a collision, arising from negligent towage, the latter having arisen upon a subsequent voyage, that which first attached had priority. Unless a lien arising from collision invests the lienor with a special property in the ship, differing in some unexplained way from that which he derives under a lien for materials, these two cases decided by the learned Justice appear to be in vital conflict.

In the next decision, that of Judge SEVERNS, rendered in the same year, The *Daisy Day*, 40 Fed., 538, it was held that a seaman's lien for wages is superior to damages from negligent towage, but that a lien for supplies was not. The decision was based partly upon *Norwich* vs. *Wright*, the learned Judge concluding that the Court, in that case, did not assume to pass on the lien for wages, but did pass on the lien for supplies as compared with that for collision damage.

In the proceeds of The *Gratitude*, 42 Fed., 299, BROWN, *J.*, in 1890, adhered to his opinion as expressed in The *Young America* (*supra*), and again awarded priority to a lien for supplies over liens for damage to cargo and damage arising from negligent towage on the same voyage.

In The *F. H. Stanwood*, 49 Fed. Rep., 577, decided in 1892 by GRESHAM, *C. J.*, and JENKINS, *D. J.*, sitting in the Court of Appeals for the Seventh Circuit, it was held that a lien for damage, caused by negligent collision, has precedence over the lien of the crew of the offending vessel for prior wages. JENKINS, *J.*, rested the decision upon the grounds (1) that the seamen share in the fault of the offending vessel, and (2) that the seamen have two remedies for their damage, while a second remedy is denied to the damage claimant, and (3) on the English cases with regard to marshaling.

There was no question of limitation in this case, and the Court expressly found the owner was solvent. The proper course would have been for the Court to have paid the seamen, and have left the damage claimant to his remedy *pro tanto* against the owner (per BENEDICT, *J.*, 16 Fed., at p. 797), upon the principle stated in The *Virgin*, 8 Peters, 538, 553, or, to have compelled the seamen on payment of their wages, to grant an assignment to the damage claimant, upon which he could have sued the shipowner personally in their right.

In The *Nettie Woodward*, 50 Fed., 224, decided in 1892, SWAN, *J.*, held that a lien for collision damages takes precedence of that for seamen's wages accruing prior to the collision. The decision was based: (1) Upon the cases of The *R. S. Carter* and *F. H. Stanwood* (*supra*) and (2) on the ground that the vessel was English and that the seamen were postponed under English law.

In the case at bar, Judge Benedict (58 Fed. Rep., 792) held that the lien arising from negligent towage, and ~~from~~ that from materials previously furnished, stood on a parity, and that the claim of the materialman should have priority because his lien attached first.

The English cases, on which some of the foregoing opinions were based, have already been dealt with. It remains only to consider the other reasons assigned for the priority of the quasi tort or tort lien.

2. The definite provisions of the maritime law as univerially administered for centuries past necessarily *imply the overruling of every one* of the reasons put forth in favor of the superiority of a pure tort lien; since there is *nothing new* in any one of these reasons. Every fact, circumstance and argument now cited, existed as distinctly, and was as clearly appreciable in all past maritime history as now, and every one of them has been universally overruled.

(1.) Of course we do not include in the above the *dictum* in *Norwich* vs. *Wright* (13 Wall., 104). That ought not to be regarded as even a *dictum* of Mr. Justice BRADLEY. It plainly is not so; it is merely a passage from Maclachlan, quoted and condensed, for the purpose of applying the last part of it, which alone had any application to that case.

(2.) When we search for any principles or sound reasons for elevating cargo damage-claims above wages and supplies we find that the only decisions favoring this change (*Vandercook*, 24 Fed., 472, and The *Daisy Day*, 40 Fed., 538), were based wholly on the above *dictum*, without any other reason or principle.

(3.) In other cases of *pure tort* as against supplies or wages, the reasons adduced seem to be some one or more of the following:

(*a.*) As to wages that the seamen are often actually in fault; and if not, that they should at least be constructively deemed to be in fault, and therefore have their lien *postponed* (The *F. H. Stanwood*, 49 Fed., 577). But the Consulado and all subsequent marine law say no (see also conclusive answer by CHOATE, *J.*, in The ORIENT, *ante* p. ):

(*b.*) That the seamen can sue the owner *in personam*, and should therefore let the ship alone and leave her to the damage-claimant. Same answer. [Here both claimants also have the same identical remedies as Dr. LUSHINGTON noted in The *Louisa Bertha*,

1 Eng. Law & Eq., 665; there cannot be any marshaling of assets here].

(*c.*) That the seamen and the supplymen dealt *voluntarily* with the ship, which the pure tort claimant in collision did not do, and was not this so from the beginning?

But *Norwich* vs. *Wright* adjudged that the pure tort claimant has only the same rank as the merchant freighter on the offending ship, and the latter does deal with her voluntarily.

That case, therefore, necessarily *adjudged* that *this circumstance makes no difference.*

The idea that a *voluntary* dealing with the ship might subject the interest of lienors to confiscation for the benefit of a *subsequent damage-claimant* originated in a *dictum* of Dr. LUSHINGTON, in The *Aline*, 1 Wm. Rob. III. It has never got lodgment in any English adjudication. It was, however, adopted in The *Pride of the Ocean*, 3 Fed., 162 and in The *R. S. Carter*, 38 Fed., 515; 40 do, 333. This idea has no analogy in its support in the municipal law. It is directly contrary to the provisions of the general maritime law, which *in view of these very contingencies of navigation*, gave the seamen and the supply men their superior privilege. In the municipal law it might just as well be urged, that the *mortgagee* of a horse which had been driven by the owner so as to injure another, could not set up his mortgage interest against an execution levied on the horse in favor of the damage claimant.

Can any reason be assigned why a mere damage claim, not arising out of any trust, credit or voluntary dealing between the parties, should have any better status, as respects a fund distributable among the creditors of a ship, than any ordinary damage claim has that is presentable against the assets of a bankrupt? The fact that the relation between colliding ships is *involuntary* reduces the damage claim to that of a mere *ordinary* tort, with the *ordinary* legal liability. Instead of being any reason for any

*special privilege* over other debts of the ship, it is a conclusive reason *against* any special preference, for the reason that there was no special credit, trust or confidence as the basis of it, and so the maritime law has always held.

(*d.*) Again it is asked, "May not a material man *who gives time* be fairly held to become *a party to the employment* of the vessel in the course of which the accident occurred, since he has a *beneficial interest* in that employment" (38 Fed., 515)?

We say no, and for several reasons.

(1.) It is not true that the material man has legally any *beneficial interest* in the employment of the vessel; he has no *lien* on her earnings or any legal *interest* in them. His lien on the vessel is precisely the same whether she earns anything or not, or whether she is employed or not.

(2.) He cannot rightfully "be *held* to become a party to her employment," because he is *not so in fact;* not having the least voice or control in regard to her employment.

(3.) The question assumes that the material man is to be punished for "*giving time*"; whereas, the reason and the only reason why the law gives him a *privilege* is to *induce* him to give time, viz., to supply the ship with *necessaries* on *credit*, when the ship could not otherwise obtain them. To induce him to "give time," and then to take away his lien because he gave it, is nonsense.

(*e*) ~~(*b.*)~~ That by thus dealing voluntarily with the ship and getting a *privilege* upon her, either for wages or for supplying her necessities, their interests in her ought to be forfeited to a vessel damaged by the ship's subsequent faults. In other words, that the whole ship must be devoted exclusively to the damage claims. But this situation was the same from the times of the Consulado; and that Code and the marine law generally have expressly overruled this contention.

Can such arguments as these be deemed to be entitled to any weight now when they have been so long and so decisively overruled?

The very fact cited by the appellants that Emerigon thought the merchant's damages was classed too low, shows the consideration given to the subject; and that Emerigon states positively that the classification of the Ordonnance "*neither creates any new privilege, nor takes away any that existed before,*" while Boulay-Paty says: "This rule is *very ancient* in the usage and the customs of these a" (see citations, *ante*, pp. 27, 28).

Nothing in the marine law has ever been better settled than the invalidity of all these objections. The appellant's whole case is in truth nothing more than an endeavor to overturn one of the oldest rules in jurisprudence, because of some doubts raised by recent cases based on the mistakes of a few English text books.

We ask the especial attention of the Court to the exhaustive discussions in the *Young America*, 30 Fed. Rep., 789; the *Amos D. Carver*, 35 Fed. Rep., 665; proceeds of the *Gratitude*, 42 Fed. Rep., 299; where the reasons for according priority to the claims of materialmen over the claims of damage caused by collision, whether due to negligent towage, or to pure tort, will be found fully set forth.

## VIII.

**The question of the *normal rank* of the two liens is now presented without embarrassment by any special circumstances connected with the limitation of liability or the marshaling of different securities held by opposing lienors. Both creditors here have precisely the same remedy.**

(1.) It is at least doubtful whether it is justifiable in any case arising under the maritime law, to displace

the lien of seamen or of materialmen by the application of the land law of *marshaling securities*. No warrant for this is found in the *older law*. Every reason and circumstance that can be cited for such a rule now has always existed, yet it was never a part of the marine law. It is a recent conception of Dr. Lushington, which the English Court of Appeal has with hesitation sustained. It is directly contrary to the spirit of the maritime law, which was intended to give a direct, a certain, and a speedy remedy in the maritime courts against the ship itself. The seamen's lien, says Cleirac, "clings to the last nail of the ship." This new doctrine takes away from the seamen this direct and certain remedy, and substitutes the inferior, slower, and uncertain remedy in *personam*. As applied in England, and as against the *foreign seaman* only, when his ship has been confiscated, and the seaman turned out of the ship without a pittance, and practically told by the Court to get home as best he can, and sue the owner, if he can find him—this policy, as contrasted with the humane spirit of the maritime law, is but refined barbarism. To us this seems a shocking departure from the marine law, which it is inconceivable that this Court can sanction.

In every case where the shipowner remains liable to seamen beyond the value of the vessel, the wages claim should nevertheless be first paid from the fund; for the damage claimant would have the same remedy *in personam* against the shipowner for the amount deducted, that the seaman would have.

(2.) The present case is, however, wholly free from these questions:

(*a.*) Because this is not a case of limitation of liability, nor has there been any surrender of the ship.

(*b.*) It does not appear but that the tug owner was in charge of the navigation (which is frequently

the fact), and that the damage to the schooner arose by the tug owner's privity or fault, in which case there could not be any limitation of liability (Rev. St., Sec. 4283).

(c.) The Act of June 26, 1884 (23 St. L., p. 57; 1 Sup. Rev. St., p. 443, § 18), provides:

"That the individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending: *Provided*, That this provision shall not affect the liability of any owner incurred previous to the passage of this act, nor prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said shipowners."

That act extends the owner's limitation of liability to *contracts*, as § 4283 had previously done to torts. The personal remedy for *wages* is, however, retained; but not any personal remedy for *supplies*. In this respect, therefore, the two claims in the present case, viz., the claim for supplies and the claim for damage to the tow, stand upon exactly the same footing. Either both claims have both remedies, or both claims have but the single remedy *in rem*. As both stand alike in that regard, there are no *different securities* to be marshalled, and the case must be decided, therefore, upon the *normal rank* of the liens themselves.

(3.) The English cases, in which, by marshalling the securities as between seamen and damage claimants, the seamen were remitted to their personal suit against the shipowner, are not in harmony with the spirit of our law. These are referred to under Point II. A similar marshaling of assets was applied in the case of The *Trident*, 1 W. Rob., 29 (overruled by Dr. LUSHINGTON in the *Priscilla*, 1 Lush., 1); The *Constancia*, 4th Notes of Cases, 285;

The *Mary Ann*, 9 Jurist, 95; and The *Dewthorpe*, 2 Notes of Cases, 264. In these cases, where one creditor had the security of both ship and freight, and the other creditor a security on the ship only, the first was required to take his relief from the freight. In The *Mary Ann* this was applied as between the bottomry holder and seamen's wages; and in The *Dewthorpe*, as between a bottomry bond and claims for pilotage, towage and seamen's wages.

These decisions like those before referred to (Point II), were made without reference to the *rank* of the lien, and were plainly independent of it; nor did they purport to affect in the least the conceded *superiority* of the *rank* of the seaman's wages, where only a single fund was available.

This is made clear by Dr. LUSHINGTON'S own statement, in his opinion in the case of The *Louisa Bertha* (Nov., 1850), in which a similar marshaling of assets was claimed as against the seamen, in a case of several different bottomry bonds (1 Eng. Law, & Eq., 665).

That case furnishes an amusing illustration of the readiness of Dr. LUSHINGTON to disregard his own *dicta*. He there said:

"The general rule, no doubt, is this: that seamen's wages are considered as a lien on the ship, and are entitled *to a priority as against all other claims;* and *those who impugn the validity of the rule are bound to show that the exception which is taken is one well founded.* * * * It is perfectly true that the mariners might proceed against the owners and master, according to the general law; but I have no doubt that the *owners of the cargo* may proceed against the owners of the ship. I have been *pressed* with the case of The *Mary Ann*, and with *an opinion I am reported to have expressed in that case;* but I *find that the opinion so expressed was a mere dictum*, and *I will never hold myself bound* by an observation so thrown out, and *not called for immediately by the circumstances* upon which I had to give my judgment" (1 Eng. L. & Eq., 668, 669);

and in that case, he refused to marshal the seamen out of Court.

We ask of this Court nothing more than the simple application of Dr. LUSHINGTON'S own rule.

## IX.

**The appellant's contention that the statutes limiting liability give damage liens a priority is ill founded.**

The statute contains no such provision. It says nothing about liens or privileges. To get discharged from *personal liability*, however, the owner must *pay* what the statute requires, viz., "the value of the ship and the freight pending" (§ 4383), or *surrender* the ship and freight (§ 4384). Prior to the Act of 1884 (1 Sup. R. S., 443, § 18), as the owner was bound to pay the full value of ship and freight to *damage* claimants, he was required to *clear off* all superior *contract* liens before he could be discharged, *Ben. Adm.* (3rd Ed.), p. 444; since the Act of 1884, as contract debts of the voyage are also included in the exemptions, except seamen's wages, they participate in the *proceeds of the ship* surrendered; as neither statute in the least disturbs the status of those debts as liens, they must be paid according to their rank.

But in this case there is no limitation of liability before the Court.

## X.

**The fact that the ship is the *instrument* of the damage is not the reason nor the basis of the damage lien as the appellants suggest.**

(1.) If this were any ground for a lien, a vessel in *tow* of a tug would be obliged to respond for the damage inflicted by her upon another vessel through

negligent towage, though the tow was not in fault. For she alone is the *instrument* of the wrong, and was badly navigated. The contrary has been decided, first in the case of The *John Fraser*, 21 How., 184; and afterwards upon elaborate discussion in the leading case of *Sturges* vs. *Boyer*, 24 How., 110. In the opinion of the Court delivered by Mr. Justice CLIFFORD (p. 123) it is said:

"Owners appoint the master and employ the crew, and consequently are held responsible for their conduct in the management of the vessel. Whenever, therefore, a culpable fault is committed, whereby a collision ensues, that fault is imputed to the owners, and the vessel is just as much liable for the consequences as if it had been committed by the owner himself. No such consequences follow, however, when the person committing the fault does not, in fact, or by implication of law, stand in the relation of agent to the owners. *Unless the owner and the person or persons in charge of the vessel* in some way *sustain towards each other* the relation of *principal and agent*, the injured party cannot have his remedy against the colliding vessel. By employing a tug to transport their vessel from one point to another, the owners of the tow do not necessarily constitute the master and crew of the tug their agents in performing the service. They neither appoint the master of the tug or ship the crew, nor can they displace either the one or the other. Their contract for the service, even though it was negotiated with the master, is, in legal contemplation, made with the owners of the vessel, and the master of the tug, notwithstanding the contract was negotiated with him, continues to be the agent of the owners of his own vessel and they are responsible for his acts in her navigation (*Sproul* v. *Hemmingway*, 14 Pick., 1; 1 Pars. Mar. L., 208; The Brig *James Gray* v. The *John Frazer et al.*, 21 How., 184)."

In this decision *figures of speech* play no part. The question, it was held, must be determined solely upon the doctrines of principal and agent; and it was held that this relation does not exist where the towage is under an *independent contract* with the owner of the tug, and the master and crew of the

tug are neither appointed nor subject to control of the owner of the tow.

It is the same with *lienors*. Manifestly a material man has not the least relation of principal to the *ship*, or to the *master* or *crew* of the ship, to which he furnishes supplies; nor has he the least *control* over the ship master or crew, and his interest in the vessel as lienor cannot, therefore, upon any such principle be subordinated to the subsequent damage lien.

(2.) The contention also that by virtue of his lien the material man is in the situation of a *co proprietor* of the ship, and that, therefore, by permitting the vessel to proceed upon her voyage his interest as lienor, like that of the owners, should be subjected to a damage lien arising on the voyage, is practically the same contention in another form, and receives the same answer.

This contention was explicitly overruled by Mr. Justice BLATCHFORD in the case of The *Frank G. Fowler*, 17 Fed., 653, where he held that a collision-damage lien, acquired against a tug, did *not* become subordinated to a similar collision-damage lien acquired upon a different voyage 19 days afterwards, but that it retained its priority, though there was abundant opportunity during the 19 days to arrest the tug for the enforcement of the prior lien.

If such a subordination should be enforced in any case, it should be where the prior lien was for *no benefit* to the ship, as in that case.

(3.) The conclusive answer, however, to this contention and the contention that all prior interests in the ship must be subordinated to a damage claim, is that no such principle is anywhere to be found in the maritime law, but that as respects beneficial liens like the present the marine law has expressly declared otherwise for centuries past. Such liens at all times have had priority over mere damage claims; and it is idle to invent unfounded hypothe-

ses and false reasons to reverse this long-settled rule. The special *privilege* is promised and given by the law to the material man as *an inducement to supply the ship's* necessities on *credit*. It cannot, therefore, be subordinated to a mere subsequent damage claim to which the lienor is not privy without falsifying this promise, and annulling the very policy which was the ground of the privilege.

## XI.

**The policy and maxims of the maritime law, preferring the minor claims of seamen and claims for necessary supplies, as against the broader damage claims of the owners of ship and cargo, are substantially re-enacted in numerous State statutes, including that of New York.**

Liens upon domestic vessels, covering amongst others (1) wages of seamen; (2) supplies both before and during the voyage; (3) breaches of contract and affreightment, and sometimes (4) injuries to property which would include collision damage, have been adopted by statute in a number of the States, the relative rank of these liens, amongst themselves, being preserved in the order given in the general maritime law, following the clasification of the Ordonnance of 1681 (*New York*, Laws 1862, Ch. 482, Sec. 1; *Louisiana*, Civ. Code, Art. 32, 37; *Massachusetts* Pub. Stat., Ch. 192, Sec. 14; *California* Code Civ. Proc., 813; *Washington* Code, Sec. 1939).

Although the rank specified for different maritime liens by State legislation is not binding upon the Federal Courts (The *J. E. Rumbell*, 148 U. S., 1), these statutes nevertheless declare, in the most authoritative form the adaptedness of the maritime law, as hereinbefore expressed, to the needs of our

time and people, and call upon the Court not to forsake, but to enforce, the true maritime law.

## XII.

**The practical results of reversing the established order of privileges would be unfavorable to commerce.**

As previously stated, claims for damage to ship or cargo are in ninety nine cases out of a hundred *insured;* the suits upon them are usually to *indemnify the insurers.* If the damage liens were allowed a privilege superior to wages and supplies, the latter claims, usually comparatively small, would be eaten up and lost. Not only would the order of privileges carefully established by the marine law for centuries past be thereby reversed, but the *very purpose* of the law in establishing any privileges at all would be thwarted.

*Privileges* (*i. e.*, preferences among claims that are all debts of the ship and therefore *quasi* liens), are in *derogation of common right.* The situation of the proceeds of a ship as respects her own creditors is much like that of the assets of a bankrupt. All preferences are prejudicial to the non privileged. They cannot be justified at all, except upon clear grounds of private right or public policy.

*Seamen* have the *highest* privilege (1) because of the *necessity* for their services; and also (2) from public policy, to induce always and at every stage of the voyage their highest efforts for the safety of all concerned, and for that reason they are prohibited to insure their wages; and (3) from their own dependent and necessitous condition; these considerations demand the highest security for the speedy payment of the pittances due them.

Seamen are prohibited to insure their wages, from public policy, in order to secure their highest exer-

tions to the last, to complete the voyage, or in case of disaster to preserve as much of the wreck as possible. This enures to the benefit of *insurers* as well as *owners*. Having thus prohibited the insurance of wages in order to secure their highest efforts for the benefit of the insurers, and under the promise of the law of a "special security upon the ship, or any wreck preserved," even to the last nail (*Ordonnance*, Lib. III., Tit. iv., Arts. 9, 19; 2 Peters' Appendix, 32, 35), is it not absurd to deprive them of this security, practically for the benefit of insurers only?

*Supplies* must be privileged, because of the ship's *necessities*, and the *necessity* of this *privilege* in order to obtain them; public policy likewise ordains this privilege, in order that commerce may thrive, and not halt or languish, from the want of the necessities of navigation or of ready means of obtaining them, through the hypothecation of the ship.

No such necessity, no such reasons of public policy exist in favor of damage claims for pure tort. No necessity, for they are insured. The insurers need no such *privilege* for they are fully paid by rates of premiums *fixed* by themselves, to which all ships and cargoes contribute the wrong-doing vessel as much as the other.

It is said that the seamen would thereby be made more careful; but this cannot be said of the supply man, who has nothing to do with the navigation, and who would only be the less willing to supply the ship's needs. And as regards the seamen, it is obvious that the suggestion has no force; since their interest in their wages and in the preservation of their own lives, is already so strongly bound up in the safety of their ship that no superior lien given to the other ship in collision could increase either their care or their efforts; on the contrary, by subordinating their claims, all further inducement would be taken away, after collision, to save as much as possible of what was left.

To elevate the *pure tort* lien above the rank which

it now holds, along with cargo damage, and to put them both above wages and supplies, would manifestly be destructive of the *very objects* for which privileges have been allowed; and it would remove *pro tanto* every reason for their existence. Not a single circumstance or reason exists now to support such a change in the law that has not existed, and in the same degree, in all periods of maritime history. But from reasons of necessity, public policy and humanity combined, the marine law for centuries past has been settled in favor of the privileges of seamen and the material man above the damages claimed. Long experience has only solidified this principle and embeded it in the code of every maritime nation. Express legislation in many of our States, down to the present moment, has confirmed this policy by everything in its power. No rule, in the whole realm of the law, has been longer or more universally approved than this by the general judgment of mankind. Upon a question of general policy and necessity, to disregard this well-nigh universal judgment; to reject the teachings of centuries of experience and trial, and to overturn and reverse the humane policy of ages past among all maritime nations, and to do this for scarcely any other practical result than to *indemnify insurance companies* who have insured against these very risks and been paid for doing so, would be a travesty upon the marine law, which this Court, we are confident, cannot sustain, and with difficulty can even seriously consider.

## XIII.

**Attention should perhaps be called to the following inaccuracies in appellant's brief and passages that may be misleading.**

1. (p. 3.) The *Aline*. Though the remarks of Dr. LUSHINGTON quoted are *conceded to have been obiter*

(see also *Abb. Ship.*, 13th Ed., p. 874), it is stated that it has always been followed. We have found no such adjudication on the point here raised, and none has been cited.

2. (p. 4.) The *Malek Adhel*. The passage quoted has no reference to support the proposition that "the *entire* damaging vessel is devoted to making restitution to the injured party." Neither this nor any other case in this Court intimates that idea.

3. (p. 5.) The *China*. The italicised words "in preference to other creditors" refers only to the owners other *non*-maritime creditors. The passage is taken by Mr Justice SWAYNE from The *Phoebe*, 1 Ware *p. 271, where the context makes this clear.

4. (p. 6.) *Curious logic*. "It is a necessary consequence of this rule *in rem* that the *entire* value of the damaging vessel becomes a pledge to the injured party for restitution." This amounts to saying that if one man has a pledge nobody else can have one on the same ship.

5. (p. 6.) *Norwich* v. *Wright*. It was *not* there "determined that *only* the liens for collision could come into concourse." No question of other liens or of contract liens was before the Court. Besides, the question there was as to the right to limit liability under the Act of Congress (§ 4284, R. S.), and to sustain that limitation the terms of the act must be complied with, without reference to the rank of different liens.

6. (p. 7.) The *Arturo*. The passage quoted does not sustain the proposition for which it is cited.

7. (p. 7.) The *Boston*. The freighter's lien there was not for "damage to cargo," but for the *sale* of cargo in a port of distress—a forced *loan;* and the bottomry bond was postponed because given on a

*prior* voyage. The case was one of two *contract* liens.

8. (p. 7.) The *America*. No one accepts this, because it agrees with nothing else in the law. Mr. Justice BLATCHFORD (in The *Frank G. Fowler*, 17 Fed., 665) said: "It is not sustained by authority, nor sustainable on principle."

9. (p. 7.) *Justi Pon* v. *The Arbustei*. The supply claim there was not regarded, *because* it was secured by a mortgage and therefore held not to be a maritime lien at all.

10. (p. 8.) The *Frank G. Fowler*. Mr. Justice BLATCHFORD'S decision that the prior lienor, by suffering the vessel to depart on a new voyage on which a second collision claim arose, *did not* subordinate his lien to the latter, is necessarily destructive of the appellant's contention.

11. (p. 9.) The *Maria and Elizabeth*. The damage claimants under § 4284 were no doubt, entitled to the full value of the vessel in the limitation proceeding, or could have pursued the owner elsewhere for the amount taken from it by prior lienors. The error was in giving an exoneration of the owner or accepting a *surrender* from him without a previous discharge of the contract liens, as required in the Second Circuit.

12. (p. 10.) The *Mellita*. Judge GILES did not so *hold*. That question was not involved; though he cited the cases referred to.

13. (p. 10.) The *Lillie Laurie*. WOODS, Circuit *J.*, gave seamen priority over the damage claims; but subordinated the *State* lien for supplies because not strictly a maritime lien, while the damage to lien was maritime—a distinction since overruled.

14. (p. 10.) The other cases cited are really based on the *dictum*, so called, in *Norwich* v. *Wright* (dealt with under Point I.).

15. (p. 11.) It was not "*conceded* by the Court" of Appeals below "that the damage claim would prevail," &c. Judge BENEDICT'S decisions on this point are irreconcilable (*vid.* Point VII.).

16. (pp. 11-18.) The distinction between pure torts and quasi torts, growing out of the negligent performance of contracts, has been long recognized in the law. The *quasi* tort is *ex delicto;* but this will not help the appellants. The whole discussion is immaterial under the adjudication in *Norwich* v. *Wright*, which elevates the pure tort lien to a position of equality with the *quasi* tort lien for goods on the delinquent ship.

17. (p. 16.) The passage quoted from Judge SEVERENS, so far as it refers to the New York cases as "*conceding*" the priority of damage claims is a mistake.

18. (p. 19). The argument that the safety of life and property at sea will be affected by upholding the priority of the supply claim, is far fetched. The safety of their own lives now affords the highest motive for seamen to avoid collisions. It is improbable that under any rule the Court may lay down, seamen, in critical moments, will stop to think who will have a prior lien on what is left of their ship-materialmen, or the damage claimants. It can make no difference to the owner; as *ex hypothese* he will lose the ship anyhow. It can hardly make a difference to him who will get the proceeds.

19. (p. 19.) The argument that by upholding the supply lien an incentive would be given to run harbor tugs "plastered over with supply liens," ignores the rule laid down in the Southern and Eastern Districts of New York (The *Gratitude*, 42 Fed., 299; The *Samuel Morris*, 63 Fed., 736) that liens of materialmen on harbor vessels *lose their priority*, if not enforced within forty days. It is incredible that in every forty days, new liens, enjoying priori-

ties, could form a very thick "plaster" on a tug (see also The *Grapeshot*, 22 Fed., 123; The *Amos D. Carver*, 35 Fed., 665). The Ordonnance confined the privilege to creditors of the voyage (2 Peters' Adm., 38, § 10). The duration of the privilege is within the control of the courts.

20. (pp. 20, 21.) *Effect of limited liability statutes.* The argument that these give damage liens a priority was demolished by Judge CHOATE in the *Orient* (*ante*, p. 16). The New York cases hold that the statute makes supply debts liens. The Act of Congress of 1884 limits the shipowner's liability for the debts of the ship as well as for her torts. Neither this nor the former statute of 1851 assumed to interfere or in any way deal with the normal rank of liens.

21. (p. 19.) The statement that "other supply liens that are not in the class of bottomry are usually doubly secured, having, along with the lien, a remedy *in personam*, which certainly postpones them to collision creditors who can only look to the offending *res*," ignores the Act of 1884, which limits the remedy of materialmen, as well as damage claimants, "to the offending *res*" (*Vid.* Point VIII, p. 53).

22. (p. 27.) *The continental procedure.* This differs from our own in form only; in substance and effect both are alike. The old English practice was undoubtedly the same as the continental (*Clerke's Praxis, translated in Hall's Adm.*, p. 60; *Brown's Civil and Adm. Law*, pp. 143, 397). The latter authority (p. 143) says:

"The torts of the master cannot be supposed to hypothecate the ship; nor, in my humble judgment, in strictness of speech, to produce any lien on it. How, then, is the ship forfeited and lost to the owner by his captain's misconduct? In my apprehension, only in this collateral way, that it is (agreeably to the practice of the Roman law as to its own citizens, extended by the modern maritime law to

foreigners) arrested until he gives bail or *fide jussore*, and sold for defaults and contempts if he will not appear."

See also the *Dictator* [1892], Prob. 304; the *City of Norwalk*, 55 Fed., 111; *Zouch. Adm.*, 125.

23. (pp. 27, 33.) In France and most other Continental States, while there is no privilege for collision damage, a *quasi* lien arises by implication, from the limitation acts, under which the collision claimant is paid out of the proceeds of sale, after discharge of the privileges, but before the shipowners non-maritime creditors. That he is postponed to the mortgage, is due to a special statutory provision, different, in that regard, from the general maritime law. We only ask the Court to regard, as evidence of that law, such portions of the French Code, as follow the rank of the ordonnance and accord with the prevailing marine law.

24. (pp. 27, 28, 29.) The argument that the rank of privileges on vessels, embodied in the later continental Codes, "cannot be an authority in our Courts," for the reasons assigned under the headings (*a*, *b*, *c*, *d*) invites an irrelevant discussion. It has not been claimed that such ranking of privileges is "an authority", nor is it at all material, save and in so far as such ranking preserves the relative rank of the four classes of privileges contained in the ordonnance. Finding the merchant freighters' lien universally postponed to that of wages and materials, in the 1681, and in 1897, we merely refer to that circumstance as evidence of the general maritime law on the subject.

25. (p. 31.) *Ship to make compensation.* While this was affirmed in some of the ancient Codes, its meaning is obscure (*vid. ante*, p. 24); but in none of the many collections of laws cited is there any provision for *priorities*, except that the wages of seamen were preferred.

## Last Point.

**The question certified should be answered in the negative.**

NEW YORK, Jan. 23, 1897.

Respectfully submitted,

J. PARKER KIRLIN,
Of Counsel for Appellees.